

# San Francisco Bay Conservation and Development Commission

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## Agenda Item #9

October 4, 2019

**TO:** Commissioners and Alternates

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**SUBJECT:** **Staff Report on Rulemaking to Amend Permit Application Fees,  
Title 14 of the California Code of Regulations, Division 5, Appendix M**  
(For Commission consideration on October 17, 2019)

### Staff Recommendation

The Executive Director recommends that the Commission adopt the revised proposed amendments to its permit application fee regulation (Title 14 of the California Code of Regulations, Division 5, Appendix M) as set forth in Attachment A to this staff report.

### Summary and Recommendations of the Permit Application Fees Working Group

On March 1, 2019, the Commission published proposed changes to the Commission's permit application fees and related regulatory provisions that are codified at Title 14 of the California Code of Regulations, Division 5, Appendix M. Appendix M contains a schedule of permit application fees that are categorized by the type of permit application. The fees were established with the goal of recovering from permit applicants 20% of the total costs of the Commission's regulatory program. Appendix M establishes procedures for adjusting the fees every five years to continue to recover 20% of the Commission's total regulatory program costs.

In summary, the Commission proposed to amend Appendix M to: (1) double all existing permit application fees; and (2) increase the percentage of the Commission's total regulatory program costs recovered from permit application fees from 20% to 40%. Under the proposal, the permit application fees would continue to be adjusted every five years. The fees could increase or decrease, depending on whether the fees collected annually during the prior five years were less than or greater than an amount equal to 40% of the total cost of the Commission's regulatory program.

On April 18, 2019, the Commission held a public hearing on the proposed amendments to Appendix M. As discussed in the staff report prepared for the hearing, and in the Initial Statement of Reasons accompanying the Notice of Proposed Rulemaking, the Commission does not retain the permit application fees it collects. Permit application fees received by the Commission are deposited into the State's General Fund, from which the Legislature appropriates funds to support the majority of all the State's activities, including the



Commission's regulatory and other programs. For state fiscal years 2012/2013 through 2016/2017, the permit fees collected by the Commission ranged from about 8% to about 25% of the amount of funds received by the Commission through appropriations from the General Fund. Thus, the Commission receives far more in financial support through appropriations from the General Fund than it generates in fee revenue for deposit into the General Fund.

In 2015, the Department of Finance approved, as part of the Governor's Budget proposal, the Commission's request for an annual budget augmentation of \$1 million from General Fund revenues. Approval of this budget augmentation was conditioned upon an agreement, made by the Commission's Executive Director, that he would propose to the Commission that it amend its permit fee regulation (*i.e.*, Appendix M) to double the Commission's existing permit application fees. Any increased fee revenue would continue to be deposited into the General Fund to reimburse the General Fund for a portion of the annual \$1 million budget augmentation and the General Fund's overall support for BCDC.

As also discussed in the staff report for the April 18<sup>th</sup> public hearing and in the Initial Statement of Reasons, under California law, a regulatory fee is valid provided the fee does not exceed the reasonable costs of providing the services necessary to regulate the activity for which the fee is charged. In other words, a regulatory agency may establish a permit fee schedule so that the total amount of fees collected equals the amount necessary to recover up to 100% of the costs of the agency's regulatory activities. As noted above, the proposed amendments to Appendix M would increase from 20% to 40% the target revenue of the Commission's total regulatory program costs to be collected from permit fees. Therefore, like the existing fees, the amended fees would continue to be directly related to the costs of the Commission's regulatory program and would not exceed the reasonable costs of that program.

At the public hearing held by the Commission on April 18<sup>th</sup>, following the staff's presentation summarizing the proposed amendments to Appendix M, two members of the public provided oral comments and several Commissioners asked questions of staff and provided comments. At the conclusion of the hearing, the Chair concurred with a suggestion that had been made to establish a Commissioner working group to further discuss with staff issues that had been raised at the hearing and to report back to the full Commission. Prior to the close of the public comment period on April 19, 2019, the Commission received three public comment letters on the proposed amendments to Appendix M.

The Permit Application Fees Working Group held three noticed public meetings – on May 20, June 27, and September 11, 2019 – to discuss the proposed amendments to Appendix M, certain issues that had been raised by Commissioners at the April 18<sup>th</sup> hearing and in public comments, and potential changes to the proposed amendments. Each working group meeting was attended by a number of Commissioners, Commission staff, and one or more members of the public. At the September 11<sup>th</sup> meeting, the Commissioner members of the working group agreed to recommend to the full Commission that it adopt the proposed amendments to Appendix M as revised in certain respects, as summarized below.

The Commissioner members of the working group agreed to recommend that, as originally proposed, the Commission double all existing permit fees and increase the percentage of the Commission's total regulatory program costs recovered from fees from 20% to 40%. In response to concerns expressed by members of the public participating in the working group meetings, the Commissioner members of the working group recommend that the fees be increased in two steps, rather than as a single increase, to ameliorate the impact of the fee increase on permit applicants and permittees. For the first two years after the effective date of the amendments to Appendix M, the fees would increase to 75%, rather than 100%, of the total amount of the doubled fees (and be 50% higher than the existing fees); after two years, the fees would step up to 100% of the total amount of the increased fees. More specifically, the following revisions are recommended to the permit application fees, based on an assumed effective date of the amendments to Appendix M of July 1, 2020: the fees would increase to 75% of the total amount of the doubled fees from July 1, 2020 through June 30, 2022; and thereafter, from July 1, 2022, the fees would be 100% of the total amount of the increased fees until June 30, 2026, or until the Executive Director recalculates the fees in accordance with the regulation.

As noted above, Appendix M establishes procedures for adjusting the permit application fees every five years, and under the proposed amendments, the fees would continue to be adjusted every five years. However, it was noted at working group meetings that if the fees are increased in two steps, rather than in a single increase, there would not be five years of permit fee revenue data to assess whether the Commission is recovering 40% of the total costs of its regulatory program for seven years after the effective date of the amendments to Appendix M. The Commissioner members of the working group determined that this would be too long a time period to defer reassessing the fees and that three years of permit fee revenue data from the fully-increased fees, rather than five years of data, will provide sufficient information to calculate whether the fees should be adjusted.

On the issue of calculating adjusted fees for subsequent years, the working group also noted that the existing regulation requires (and the proposed amendments would require) a comparison of both permit fee revenue data and total regulatory program costs data collected on a state fiscal-year basis, but that any adjusted fees would go into effect on January 1 of the next calendar year following the end of the last fiscal year for which data are collected for analysis. This procedure would result in six months of permit fee revenue data from the period before any fee adjustment being averaged together with fee revenue data from any adjusted fees in calculating a potential future fee adjustment. In addition, this procedure would allow only a six-month period to collect the fee revenue and regulatory program cost data required to determine whether the fees should be adjusted and for any adjusted fees to go into effect, leaving little time for notice of any adjustments to permit applicants and permittees. For these reasons, the working group recommends that the fee adjustment procedure be modified to allow a full year between the end of the last fiscal year for which data is collected for analysis and the effective date of any adjusted fees.

More specifically, the following revisions are recommended to the regulatory provisions governing the calculation of permit fees for subsequent years: (1) potential fee adjustments would be calculated based on permit fee revenue data and total regulatory program cost data for the three-year period ending on June 30, 2025 (*i.e.*, from July 1, 2022 to June 30, 2025); (2) the potential fee adjustments would be calculated between September 1 and December 31, 2025, and would go into effect on July 1, 2026; (3) after June 30, 2025, potential fee adjustments would be calculated every four years based on permit fee revenue data and total regulatory program cost data for the three-year period following the effective date of any adjusted fees; and (4) the potential fee adjustments would be calculated between September 1 and December 31 after the end of the third-fiscal year for which data is collected and would go into effect July 1 of the following fiscal year.

The working group also discussed, and recommends that the Commission adopt, a fee reduction for project costs paid by a grant from the San Francisco Bay Restoration Authority. Specifically, for an application for a major permit, administrative permit, or a material amendment to a permit for a project for which all or a portion of the project costs would be paid with a grant from the San Francisco Bay Restoration Authority, the amount of the grant would be subtracted from the total project cost and the difference would be used in determining the applicable permit application fee under the Appendix M fee schedule. Attachment B to this staff report is a memorandum prepared by staff and provided to the working group at its September 11<sup>th</sup> meeting analyzing the potential permit fee reduction (*i.e.*, potential lost permit fee revenue) from the recommended fee reduction for projects that receive San Francisco Bay Restoration Authority grants.

Attachment A to this staff report is a revised version of the proposed amendments to Appendix M that incorporates the recommendations of the Commission members of the working group, as discussed above.

## Response to Public Comments

The Commission received three comment letters during the public comment period on the proposed amendment to its permit fee regulation. In addition, two of the commenters who submitted letters also provided oral Comments at the April 18, 2019 public hearing on the proposed amendments. Attachment C to this staff report includes the three comment letters and an excerpt of the minutes of the Commission's April 18, 2019 meeting with the public Comments on this agenda item. The comment letters are numbered 1 through 3, and each comment is assigned a letter. The oral Comments are identified as Comments 4A through 4D and 5A through 5D, as indicated on the excerpt of the Commission meeting minutes.

The public Comments received by the Commission are summarized, paraphrased, or in some cases repeated verbatim below, followed by the staff's responses on behalf of the Commission.

1. **Comments 1A, 4A, and 4E:** These Comments express concern that doubling the Commission's permit application fees will impact future restoration and development projects around the region, and that BCDC application fees are based on project cost, which inherently tracks with overall economic costs in California.

**Staff Response:** The Notice of Proposed Rulemaking, Initial Statement of Reasons, and Economic and Fiscal Impact Statement (Form 399), including the supplement thereto, contain considerable information regarding the estimated costs to permit applicants and anticipated economic impacts, as well as the benefits to the State of California, of the proposed amendments to the Commission's permit fee regulation (Title 14 of the California Code of Regulations, Division 5, Appendix M). Under the existing regulation, application fees for larger, more costly projects range from 0.04% to 0.20% of the total project cost (TPC), depending on the type of application and the TPC. Under the proposed amendments, the increased application fees for larger, more costly projects would range from 0.08% to 0.40% of TPC, depending on the type of application and the TPC. Thus, the proposed increase in application fees would be a relatively small increase in costs to applicants when compared to the total value of the projects for which applications are filed. Moreover, the increased fees would remain a small percentage or portion of an applicant's TPC. The increased fees would continue to be paid on a one-time basis (upon submission of a permit application), and it is not expected that the increased fees would deter applicants from implementing proposed projects.

To estimate the impact of the proposed amendments to double the existing fees, the Commission staff conducted a survey of the Commission permit applications filed during the five State fiscal years 2012/2013 through 2016/2017. The survey results were used to estimate the annual average fees and fee revenue from the proposed amended fees by type of permit application and type of applicant. Based on the survey results, staff estimates that the annual average fee revenue (and corresponding cost to permit applicants) from all applicants under the proposed increased fees would be approximately \$1,338,861, an increase of approximately \$669,430 from the annual average amount of fee revenue generated from the current fees. (The figure of \$1,338,861 is an annual average; staff expect the actual annual fee revenues would fluctuate each year, but over a five-year period, the fee revenue should reflect the annual average.) Most of the annual average increased fee revenue (*i.e.*, the cost of permit application fees) would be paid by an annual average of approximately 111 applicants for major permits, administrative permits, or permit amendments, resulting in an estimated average increased cost per applicant of approximately \$6,000. (See Supplement to the Economic and Fiscal Impact Statement, Attachment Five.) The survey results support the Commission's determination that the increased fees would not be significant compared to an applicant's TPC and would not result in significant adverse economic impacts directly affecting businesses or state or local agency permit applicants.

2. **Comments 1B and 2C:** There currently is insufficient information available to evaluate the proposed doubling of permitting fees, particularly because the additional revenue received from any increase would go directly to the State with no guarantee of increases in funding to BCDC.

**Staff Response:** The Notice of Proposed Rulemaking, Initial Statement of Reasons, and technical studies and other materials relied upon, which are listed on page 11 of the Initial Statement of Reasons, including the Economic and Fiscal Impact Statement (Form 399) and supplement thereto, contain sufficient information to evaluate the proposed doubling of the Commission's permit application fees. To compare the Commission's existing fees, and the proposed increased fees, to the fees charged by a number of other government agencies, Commission staff surveyed the fee schedules of one state agency – the California Coastal Commission – and a sampling of four Bay Area local governments – the City and County of San Francisco; Contra Costa County; City of Berkeley; and City of Fremont. The survey results show that the Commission's existing fees are in many cases less than, and in other cases are higher than but not excessive in comparison to, the fees charged by the Coastal Commission and by local Bay Area governments with mandates and permit fee schedules comparable to the Commission. In addition, to estimate the impact of the proposed increased fees, the Commission staff conducted a survey of the Commission permit applications filed during the five State fiscal years 2012/2013 through 2016/2017. The results of that survey were used to estimate the annual average fees and fee revenue from the proposed amended fees by type of permit application and type of applicant. The survey results support the Commission's determination that the increased fees would not be significant compared to an applicant's total project cost and would not result in significant adverse economic impacts directly affecting businesses or state or local agency permit applicants.

The Executive Director proposed that the Commission consider amending its permit application fee regulation, to double the existing fees, in accordance with the request made by the Department of Finance. The Department of Finance, as part of the Governor's fiscal year 2015/2016 budget proposal, approved the Commission's request for an annual budget augmentation of one million dollars from General Fund revenues. As stated in the Initial Statement of Reasons, the purpose of the proposed amendments to the Commission's permit application fee regulation "is to double the amount of permit fee revenue generated by the Commission and deposited into the General Fund on an annual basis." However, the proposed increased fees will have no direct effect on BCDC's future funding. BCDC will continue to be funded through a combination of sources, with the majority of its funding from the General Fund. Although the fee revenue would continue to be deposited to the General Fund, like the existing fees, the proposed increased fees will relate to the costs of the regulatory services provided by the Commission to permit applicants and will not exceed the reasonable costs of the regulatory program.

3. **Comments 1C, 2D, 2F, 2S, 2T, 4B, 4C, 4F, 5B, 5D, 5F, and 5G:** Prior to increasing its permit fees, the Commission should improve the efficiency of the permitting process and reduce regulatory costs. Commission staff should review the permitting program to identify existing inefficiencies in the permitting process. The proposed fee increase should be accompanied by a commensurate exercise to improve efficiency and reduce regulatory costs. The Commission should direct staff to bring back a proposal that would reduce staff costs associated with the permit processing program by at least 15%, before moving forward with any action on the fee increase. BCDC has created many costly and time-consuming problems due to badly written permits and poor administrative processes. If applicants are to pay double the current fees, BCDC should improve its permit process and reduce the need for multiple amendments and other wasteful enforcement actions. There is no justification for the current backlog of over 250 enforcement actions. In analyzing the merits of a fee increase, one must look at both sides of the equation: fees, and the costs the fees are intended to offset. BCDC's costs are out of control. BCDC generates hundreds of meaningless actions with permittees, resulting in many permit amendments and numerous enforcement actions. Improvement in staff efficiency will improve the fiscal responsibility far more than fee increases. Streamlining the permitting process should be a part of any changes in fee structure. At a recent Enforcement Committee meeting, they recommended a significant amnesty program. Unless there is reform in the enforcement program, amnesty will be an ongoing issue.

**Staff Response:** The procedural and substantive requirements of the Commission's permitting process are established by state law, including but not limited to the McAteer-Petris Act, the Suisun Marsh Preservation Act, the Commission's regulations, and the San Francisco Bay Plan. A permit applicant's obligation to comply with such requirements, and incur associated costs, is both beyond the Commission's control and irrelevant to the proposal to increase the Commission's permit application fees, except to the extent that the Commission also incurs regulatory program costs to review, evaluate, and process permit applications.

On May 14, 2019, the California State Auditor issued an audit report regarding BCDC's enforcement program. Among other matters, the report found that:

"the commission generally drafted reasonable permit conditions that complied with applicable state law.... We reviewed five permits and found no instances when the commission included a condition that appeared unreasonable or outside its legal authority." Audit Report at 43.

In the future, the Commission may propose and adopt amendments to certain of its existing regulations governing the Commission's permitting process, but the Commission does not agree that adoption of the proposed amendments to its permit fee regulation should be deferred pending such other potential regulatory changes.

The commenter provided no analysis to support its claims that BCDC has created many costly and time-consuming problems due to badly written permits and poor administrative processes, or that the agency has generated hundreds of meaningless actions with permittees, resulting in many permit amendments and numerous enforcement actions. Moreover, the audit report contains no findings or recommendations that support these comments. BCDC does not generate permit amendments; rather, permittees request amendments when a project is modified or additional development is proposed, or due to a substantial change in use or changed circumstances. BCDC brings an enforcement action for a permittee's noncompliance with a permit or for unpermitted activities in violation of the McAteer-Petris Act or the Suisun Marsh Preservation Act. As noted in the audit report, BCDC has a backlog of approximately 230 enforcement cases. The audit report recommended suggested actions for the Legislature and Commission to implement as the Commission makes progress toward revitalizing its enforcement efforts. The Commission generally agrees with many of the audit report's recommendations and has already begun implementing certain of those recommendations. In addition, the Commission plans to use the audit report to advocate for more resources to allow the Commission to improve its enforcement program and do more enforcement better. At an Enforcement Committee on December 13, 2018, staff presented, and the Committee discussed, a number of potential options for reducing the backlog of enforcement cases, including potential approaches to amnesty for certain violations, but staff did not recommend, nor did the Enforcement Committee adopt, or recommend that the full Commission consider, an amnesty program.

Real or perceived inefficiencies in the permitting process may result from a number of factors beyond the control of the Commission or its staff including but not limited to: (1) an applicant modifying a proposed project during the permitting process; (2) an applicant failing to submit a complete permit application or to provide all necessary information to staff in a timely manner; (3) an applicant failing to obtain local discretionary approval or other required authorizations in a timely manner; (4) the need for Commission staff to obtain information from or otherwise coordinate with the staffs of other agencies having jurisdiction over a proposed project; and (5) the need for Commission staff to apply updated guidance on rising sea level in developing, and negotiating with applicants, appropriate permit conditions related to climate change adaptation.

The commenter provided no support for its claim that that BCDC's costs are "out of control." The Commission has consistently operated within a constrained budget, and its expenses have never exceeded or otherwise overrun its budget authority. Moreover, the Commission's budget and all major budget changes must be approved by the Department of Finance, the Legislature, and the Governor as part of the State budget process. The Commission consistently works to minimize its operating costs.

The audit report recommended that the Commission conduct a workforce study of all its permitting and other regulatory activities and determine whether it requires additional staff, including supervisors, to support its mission; but the audit report did not find that staff costs associated with the permitting process are unreasonable or suggest that the Commission conduct a study to identify measures to improve efficiency and reduce such costs.

As stated in the Initial Statement of Reasons, the purpose of the proposed amendments to the Commission's permit application fee regulation "is to double the amount of permit fee revenue generated by the Commission and deposited into the General Fund on an annual basis." These Comments do not identify any reasonable alternative that would be more effective in carrying out the purpose of the proposed amendments, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law governing the Commission's permit application fees. See Government Code sections 11346.5(a)(13) and 11346.9(a)(4).

To the extent these Comments are objections to the adoption of the proposed amendments to the Commission's permit application fee regulation, such objections are noted. The Commission will analyze the proposed amendments and determine whether to increase its permit application fees for the reasons set forth in the Initial Statement of Reasons and Final Statement of Reasons.

4. **Comments 1D, 2A, 2Q, 4D, and 5A:** The Commission should take no action should on the permit fee structure until completion and review of the pending audit of BCDC's enforcement program by the California State Auditor and implementation of appropriate reforms as a result of the review are in place. The audit may reveal opportunities to reduce costs associated with the permitting process.

**Staff Response:** On May 14, 2019, the California State Auditor issued an audit report regarding BCDC's enforcement program. The audit report recommended suggested actions for the Legislature and Commission to implement as the Commission makes progress toward revitalizing its enforcement efforts. The Commission generally agrees with many of the audit report's recommendations and has already begun implementing certain of those recommendations. In addition, the Commission plans to use the audit report to advocate for more resources to allow the Commission to improve its enforcement program and do more enforcement better. However, the Commission does not agree that adoption of the proposed amendments to its permit fees regulation should be deferred pending further review or implementation of the audit report's recommendations.

Among other matters, the audit report found that:

“the commission generally drafted reasonable permit conditions that complied with applicable state law.... We reviewed five permits and found no instances when the commission included a condition that appeared unreasonable or outside its legal authority.” Audit Report at 43.

The audit report recommended that the Commission conduct a workforce study of all its permitting and other regulatory activities and determine whether it requires additional staff, including supervisors, to support its mission; but the report did not find that staff costs associated with the permitting process are unreasonable or suggest that the Commission conduct a study to identify opportunities to reduce staff costs associated with the permitting process.

5. **Comment 2B:** The rationale for seeking an increase in fees appears to be because the Department of Finance suggested it — this in turn because BCDC continues to overrun its budget. Does the Department of Finance in making this suggestion satisfy criteria under the Office of Administrative Law criteria?

**Staff Response:** As explained in the Initial Statement of Reasons, in 2015, the Department of Finance approved, as part of the Governor’s budget proposal, the Commission’s request for an annual budget augmentation of \$1 million from General Fund revenues. Approval of this budget augmentation was conditioned upon an agreement, made by the Commission’s Executive Director, that he would propose to the Commission that it amend its permit fee regulation to double the Commission’s existing permit application fees, all of which are deposited into the General Fund. During the budget discussions with the Department of Finance, it was recognized that any changes to the Commission’s permit fee schedule require Commission approval.

The Department of Finance did not suggest that the Commission increase its permit application fees, and the Commission has not proposed to amend its permit fee regulation, because the Commission “continues to overrun its budget.” The Commission has consistently operated within a constrained budget, and its expenses have been within and have not exceeded, or otherwise overrun, its budget authority. Moreover, the Commission’s budget and all major budget changes must be approved by the Department of Finance, the Legislature, and the Governor as part of the State budget process. The Commission consistently works to minimize its operating costs.

The Department of Finance’s request that the Executive Director propose to the Commission that it consider amending its permit application fee regulation to double the existing fees is not required to satisfy the Administrative Procedure Act (APA) or the regulations implementing the APA issued by the Office of Administrative Law (OAL). The Commission has submitted its Notice of Proposed Rulemaking, Initial Statement of Reasons, Economic and Fiscal Impact Statement, and the text of the proposed amendments to OAL, in accordance with the APA and OAL’s regulations. OAL published the Notice of Proposed Rulemaking in the California Regulatory Notice Register (see Register 2019, No. 9-Z, March 1, 2019). After the Commission adopts amendments to it

permit application fee regulation, the Commission will submit to OAL a Final Statement of Reasons, the text of the adopted amendments, and any other documents required by law.

6. **Comments 2E and 5C:** Any change in fee structure should be accompanied by modernizing the BCDC permit process. We support the reform of the permitting process suggested by the Bay Planning Coalition; Sustainable Waterfronts Committee dated November 21, 2017.

**Staff Response:** On May 14, 2019, the California State Auditor issued an audit report regarding BCDC's enforcement program. Among other matters, the report found that:

“the commission generally drafted reasonable permit conditions that complied with applicable state law.... We reviewed five permits and found no instances when the commission included a condition that appeared unreasonable or outside its legal authority.” Audit Report at 43.

In the future, the Commission may propose and adopt amendments to certain of its existing regulations governing the Commission's permitting process, but the Commission does not agree that adoption of the proposed amendments to its permit fee regulation should be deferred pending such other potential regulatory changes.

The commenter's support for the comments and recommendation made by the Bay Planning Coalition (BPC) in November 2017 is acknowledged. BPC's comments and recommendations were to promote a more efficient and cost-effective approach to regulatory approvals for priority shoreline restoration and resiliency projects in the Bay Area, and were directed to all concerned regulatory agencies, not solely to BCDC. Consistent with those comments and recommendations, in 2019, the Commission and the other state and federal regulatory agencies with jurisdiction over wetlands restoration projects in San Francisco Bay formed and convened the Bay Restoration Regulatory Integration Team (BRRIT). The BRRIT is a team of dedicated and funded staff from the following agencies: the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Services, National Oceanic and Atmospheric Administration National Marine Fisheries Service, the San Francisco Bay Regional Water Quality Control Board, California Department of Fish and Wildlife, and the Commission. In addition, the U.S. Environmental Protection Agency is providing staff to support the BRRIT. The purpose of the BRRIT is to improve and expedite the permitting process for multi-benefit wetland restoration projects and associated flood management and public access infrastructure in San Francisco Bay by dedicating agency representatives to review project information and prepare permit applications for consideration as a team in the most efficient manner. The BRRIT will allow for project applications to be reviewed by an experienced team of regulatory and resource agencies in parallel, versus sequential reviews by each agency, and the coordinated pre-application process will document all issues and recommendations.

7. **Comments 2G, 2R and 5E:** The McAteer-Petris Act sets a minimum \$20 cost to trigger a permitting action, and the Commission has expanded its interpretation to “any improvement exceeding \$20 requires authorization.” This is a meaningless amount in 2019 and serves only to generate paper violations which cause no harm the environment nor impact to public access. In updating its fees, BCDC should at the same time increase the project amount trigger from \$20.00 to a reasonable number (perhaps \$20,000) before authorization or permits are necessary.

**Staff Response:** The McAteer-Petris Act requires any person or governmental agency wishing to place fill, to extract materials, or to make any substantial change in use of any water, land, or structure, within the area of the Commission’s jurisdiction to obtain a permit from the Commission, and the Act further provides that “[f]or purposes of this section ‘materials’ means items exceeding twenty dollars (\$20) in value.” Gov’t Code § 66632(a). The Commission has not adopted a regulation interpreting the statutory provision requiring a permit for the extraction of materials exceeding \$20 in value, and the commenter fails to identify the source of its purported quote that the Commission has expanded its interpretation of this provision to “any improvement exceeding \$20 requires authorization.” Any change to the statutory requirement that a permit from the Commission must be obtained for the extraction of materials exceeding \$20 in value would require legislative action to amend the McAteer-Petris Act and could not be made by the Commission administratively. This comment is not relevant to the Commission’s proposal to amend its permit fee regulation to increase the existing permit application fees.

8. **Comment 2H:** BCDC is quite inefficient. Using BCDC’s sister agency for comparison, the California Coastal Commission is far more efficient, spending approximately \$1.24 per foot of California shoreline annually (with a budget of \$22.4 M). BCDC by comparison spends \$11.30 for every foot of Bay shoreline annually (\$8M budget). This is ten times more expensive for the same job (based on public USGS and NOAA data of actual shoreline). It is noteworthy that BCDC publishes its own shoreline data and claims it is responsible for 50% of California’s shoreline, an astonishing and grossly misleading overstatement. And the number of Coastal Commission amendments and enforcement actions are dwarfed by those of BCDC.

**Staff Response:** There is no merit to the commenter’s comparison of the alleged efficiency of BCDC and the Coastal Commission, as calculated by dividing the amount of each agency’s annual budget by the length of each agency’s coastline jurisdiction in feet, to produce a “budget dollar per foot of coastline” figure for each agency. First, BCDC and the Coastal Commission are separate agencies and have different roles and responsibilities within their vastly different jurisdictions. As established by the McAteer-Petris Act and the Suisun Marsh Preservation Act, BCDC’s jurisdiction includes San Francisco Bay, a shoreline band within 100 feet of the shoreline, salt ponds and managed wetlands adjacent to the Bay, and certain waterways tributary to the Bay, as well as the Suisun Marsh. As established by the Coastal Act, the Coastal Commission’s jurisdiction covers the coastal zone from the Oregon border to the Mexico border,

including state waters extending three miles offshore and all offshore islands and extending inland generally 1,000 yards from the mean high tide line but in some areas extending as far as five miles inland. A major role of the Coastal Commission is to review and approve local coastal programs (LCP) prepared by cities and counties; once an LCP is approved, the city or county issues and enforces coastal development permits within its jurisdiction, with the Coastal Commission acting as an appellate body. In contrast, in addition to its regional planning responsibilities, BCDC is directly responsible for permitting and enforcement for all geographic areas within its jurisdiction, except for development within the secondary management area of the Suisun Marsh, where permits are issued by local jurisdictions and BCDC acts as an appellate body. Second, comparing conservation and development issues between the Bay and the open coast is, at best, meaningless. Such a comparison fails to take into account that the Bay shoreline is more intensively developed on a percentage basis and is different in almost every respect from the California coastline.

Third, even if one wanted to use total budget and length of shoreline as a yardstick to compare the two agencies, the claim that the Coastal Commission spends \$1.24 per foot of California shoreline annually while BCDC spends \$11.30 per foot of Bay shoreline annually is blatantly wrong. The commenter fails to provide the total mileage figures used in its calculations for the length of each agency's coastline. Using the commenter's figures, and converting feet to miles, according to the commenter, the California shoreline is over 3,400 miles long, or approximately three times the length of the California coast as described by the Coastal Commission's Executive Director (*i.e.*, 1,271 miles), and the Bay shoreline is about 134 miles in length. In contrast to the Bay shoreline length derived from the commenter's figures, a recent analysis by BCDC Geographic Information System (GIS) staff found that estimates of the perimeter of the Bay range from 883 miles to 2,400 miles, depending on whether tidal creeks, rivers, channels, Suisun channels, and BCDC's "certain waterways" jurisdiction are considered. The National Oceanographic and Atmospheric Administration is the source of the 2,400-mile estimate. BCDC's GIS staff notes that a figure of 400 miles has been used as the lowest detailed approximation of the length Bay shoreline (*i.e.*, accounting for no creeks or tidal sloughs) and may be the basis of the statement on the BCDC website that that the Bay's shoreline is approximately half the length of the California coastline, when the Coastal Commission formerly used a figure of 1,100 miles. If the California coast and Bay shorelines are assumed to be 1,271 miles and 883 miles in length, respectively, and using the verified budget figures from the Governor's 2019-2020 budget documents, the Coastal Commission spends approximately \$4.75 per foot of shoreline annually while BCDC spends approximately \$2.17 per foot of shoreline annually, less than half of the comparable Coastal Commission figure. Using the "traditional" BCDC estimate of about 500 miles of Bay shoreline, BCDC spends approximately \$3.83 per foot of shoreline annually, still only about 80% of the Coastal Commission figure. The BCDC budget figure used in the preceding calculations does not include the one-time budget augmentation

for BCDC's recent office relocation. If that one-time budget augmentation were included, and if the Bay shoreline is assumed to be 883 miles or 500 miles in length, BCDC spends approximately \$2.80 or \$4.95 per foot, respectively, of shoreline annually.

Finally, the commenter's reference to the number of Coastal Commission amendments and enforcement actions is unclear, and the commenter failed to provide any information to support its claim that Coastal Commission amendments and enforcement actions are dwarfed by those of BCDC. In fact, the Coastal Commission has a backlog of about 2,500 enforcement cases, or about ten times the size of BCDC's backlog. Therefore, BCDC is unable to respond any further to this comment.

9. **Comment 2I:** The comparative data BCDC used to determine if the fees are comparable to other jurisdictions only compare "new construction." What would the data show if it included remodels and "minor" repairs? The determination of fees did not include actual conversations with those who determine the fees in the other localities, a poor process.

**Staff Response:** As discussed in the Initial Statement of Reasons, to compare the Commission's permit application fees to the permit fees charged by a number of other government agencies, staff surveyed the fee schedules of one state agency – the California Coastal Commission -- and a sampling of four Bay Area local governments -- the City and County of San Francisco; Contra Costa County; City of Berkeley; and City of Fremont. These agencies were chosen for comparison because their fee categories are relatively similar to the Commission's. The majority of these agencies' fees are flat fees and are based, at least in part, on total project construction or development costs. The permit fees charged by these agencies were compared to the fees charged by the Commission for major permits and administrative permits. Major permits issued by the Commission generally involve new construction; however, administrative permits may be issued for new construction or for modifications of existing development. The City and County of San Francisco has two fee schedules, one for new construction and another for change in use or alteration of an existing building, and staff used the fee schedule for new construction in the survey. The permit fees charged by the other agencies surveyed are based on development costs or the value of the work, irrespective of whether the work involved new construction or modification of existing development.

Because the permit fees charged by the Commission and by the other agencies surveyed, with the exception of the City and County of San Francisco, do not distinguish between new construction and modification of existing development, it generally would not have been feasible to attempt to separately compare permit fees associated with new construction and those associated with modification of existing development. Moreover, attempting to compare the permit fees charged by the Commission and by the other agencies surveyed for modification of existing development was unnecessary given that the objective of the survey was to provide the Commission with a general idea of the amount of permit application fees incurred by applicants for development projects in the Bay Area. Similarly, BCDC staff determined that to meet this objective, it

was not necessary to contact the staff of each agency surveyed to discuss that agency staff's interpretation of the agency's fee schedule, or to determine whether the agency charges other fees, in addition to building permit fees.

10. **Comment 2J:** The methodology of determining if BCDC hits the goal of 40% of cost recovery uses a five-year average in collection of fees, but only using the highest annual total regulatory program cost. The criteria should be the same for both, otherwise it is setting up a situation where BCDC will always be below their 40% fee revenue goal.

**Staff Response:** The Commission is not proposing any change in the methodology established by the existing regulation to determine whether permit application fees would be adjusted, except that under the revised recommended proposal, potential adjustments would be calculated based on data collected for the prior three fiscal years, rather than for the prior five fiscal years as under the existing regulation. That methodology involves calculating the average fiscal year revenue from fees collected over the prior three fiscal years and determining the highest fiscal year total regulatory program costs over the prior three fiscal years. The methodology also provides that forty percent, under the proposed amendments (rather than twenty percent under the existing regulation), of the highest fiscal year total regulatory program cost is the "target revenue," which is compared to the average annual fee revenue in determining whether the fees are to be adjusted. If the average fiscal year total regulatory program costs over the prior three years were used in the methodology, rather than the highest annual fiscal year total regulatory program costs, the target revenue would be somewhat lower and, therefore, in comparing the target revenue to the average annual fee revenue, it is more likely that target revenue would be achieved. Stated differently, by using the highest annual fiscal year total regulatory program costs, it is less likely (than would be the case if the average fiscal year total regulatory program costs were used), that the fees would be adjusted. However, it does not follow that using the methodology established by the regulation, BCDC will always be below the target revenue goal simply because the regulation provides for use of the highest annual fiscal year total regulatory program costs. Whether or not the fees would be adjusted would depend on both the average annual fee revenue during the prior three years and the highest fiscal year total regulatory program cost during the same period.

11. **Comment 2K:** The permit fee issue is another example where BCDC has not been doing their job. According to the audit report BCDC failed to do a review of fees in 2013.

**Staff Response:** The existing permit application fee regulation provides that potential fee adjustments shall be calculated for each five-year period following the effective date of the regulation, commencing in 2013. As explained in the Initial Statement of Reasons, without either a Chief Counsel or a Chief Budget Officer, Commission staff was unable to calculate potential fee adjustment in 2013. The California State Auditor's report, which was issued on May 14, 2019, also notes that the Commission failed to determine whether its permit fees should be adjusted in 2013. The proposal to amend the Commission's permit fee regulation, to double the existing permit application fees, is

totally distinct from the requirement of the existing regulation to determine potential fee adjustments every five years (or to determine potential fee adjustments based on data collected for the prior three fiscal years under the modified recommended proposal). The Commission authorized staff to initiate this rulemaking process on February 1, 2018, and issued a Notice of Proposed Rulemaking, Initial Statement of Reasons, and associated documents formally commencing the process on March 1, 2019. Thus, the proposal to amend the Commission's permit application fee regulation is also completely unrelated to the audit report, which was issued on May 14, 2019.

12. **Comment 2L:** BCDC is under an audit and losing court cases for its failed enforcement process. When will the Commission recognize that it is responsible for its staff, not to its staff, and a leadership change is urgently needed?

**Staff Response:** On May 14, 2019, the California State Auditor issued an audit report regarding BCDC's enforcement program. The audit report recommended suggested actions for the Legislature and Commission to implement as the Commission makes progress toward revitalizing its enforcement efforts. The Commission generally agrees with many of the audit report's recommendations and has already begun implementing certain of those recommendations. In addition, the Commission plans to use the audit report to advocate for more resources to allow the Commission to improve its enforcement program and do more enforcement better. The audit report did not recommend any changes in BCDC's "leadership," and the Commission does not agree that any changes in its executive, management, or other staff are needed. This comment is irrelevant to the proposed amendments to the Commission's permit fee regulation.

13. **Comment 2M:** BCDC receives consistency determinations submitted by federal government agencies under the Coastal Zone Management Act (CZMA) but does assess fees. This work should be deducted from the total regulatory program cost; otherwise local agencies are subsidizing the federal government.

**Staff Response:** Both the McAteer-Petris Act and the Suisun Marsh Preservation Act authorize the Commission to require the payment of a reasonable permit application fee. Gov't Code § 66632(c); Pub. Res. Code § 29520(b). Consistency determinations submitted by federal agencies are not permits under state law. The Commission reviews and acts on consistency determinations pursuant to the procedural and substantive requirements of the federal Coastal Zone Management Act (CZMA). The CZMA does not require federal agencies to pay state processing fees, and the regulations implementing the CZMA prohibit state agencies from assessing a fee to process a federal agency's consistency determination "unless payment of such fees is required by other federal law or otherwise agreed to by the federal agency and allowed by the Comptroller General of the United States." 15 C.F.R. § 930.41(e).

14. **Comment 2N:** Currently local governments pay the same fees as the private sector. There should be no changes in this rule as it would create a real conflict with the Commissioners who represent local government.

**Staff Response:** The existing permit application fees are categorized by the type of permit application and increase with the applicant's total project cost. The existing fees are independent of the type of applicant (*i.e.*, the fees are same whether the applicant is a private party, a state agency, or a local government). The proposal to amend the Commission's permit fee regulation would make no changes in this regard; the proposed increased fees would continue to be same for all permit applicants for any particular type of permit application and total project cost.

15. **Comment 2O:** Nowhere in the literature for the proposed fee increases is there a clear definition of "Administrative" versus "Major" Permits. How is this determined, who determines whether an application is for a major permit or an administrative permit, and is there an appeal process?

**Staff Response:** The Commission's regulations define "major permit" and "administrative permit" at Title 14 of the California Code of Regulations (14 C.C.R.) sections 10300 and 10600, respectively. The Executive Director may advise an applicant that a proposed activity would require a major permit or may be authorized by an administrative permit, or an applicant may assert that an activity may be authorized by an administrative permit. 14 C.C.R. § 10610. If the Executive Director believes that an application for an administrative permit does not properly qualify for processing as an administrative permit, he or she will notify the applicant of such determination and the applicant may take the application to the Commission by complying with the regulatory provisions dealing with major permit applications. *Id.* §§ 10611(a), 10624. If the Executive Director believes that an application for an administrative permit is complete and properly qualifies for processing as an administrative permit, the Commission may nevertheless determine that the Commission should process the application as a major permit. *Id.* § 10621(a)(1). The proposed amendments to the Commission's permit application fee regulation would make no changes to any of the regulations cited in this response. This comment is not relevant to the proposed amendments to the Commission's permit fee regulation.

16. **Comment 2P:** Have these fees and this process been submitted to and reviewed by the Office of Administrative Law?

**Staff Response:** The Commission has submitted its Notice of Proposed Rulemaking, Initial Statement of Reasons, Economic and Fiscal Impact Statement, and the text of the proposed amendment to the Office of Administrative Law (OAL), in accordance with the Administrative Procedure Act (APA) and OAL's regulations. OAL published the Notice of Proposed Rulemaking in the California Regulatory Notice Register (see Register 2019, No. 9-Z, March 1, 2019). After the Commission adopts amendments to its permit application fee regulation, the Commission will submit to OAL a Final Statement of Reasons, the adopted amendments, and any other documents required by law.

17. **Comment 3A:** The proposed permit-fee regulations tie permit application fees to “total project cost,” even if some or most of a project is outside BCDC’s jurisdiction. The proposed regulations define “Total project cost” as “all expenditures ... for ... all aspects of the project *both inside and outside the Commission’s jurisdiction.*” (Appendix M, paragraph (d), emphasis added.) The proposed regulations cite no authority justifying charging for work done outside BCDC’s jurisdiction. It is not reasonable to require applicants to pay fees for development within BCDC’s jurisdiction that are tied to the value of development outside BCDC’s jurisdiction, or that value (for purposes of the fee calculation) development outside BCDC’s jurisdiction equally to development within BCDC’s jurisdiction.

**Staff Response:** Both the McAteer-Petris Act and the Suisun Marsh Preservation Act authorize the Commission to require payment of a reasonable filing fee and reimbursement of expenses for the processing of a permit application. Gov’t Code § 66632(c); Pub. Res. Code § 29520(b). In addition, the California Constitution authorizes the imposition of a charge or fee “for the reasonable regulatory costs to the State incident to issuing licenses and permits.” Cal. Const. art. XIII A, § 3(b)(3). A regulatory fee is valid provided the fee does not exceed the reasonable costs of the governmental activity for which the fee is charged, the fee is not imposed for unrelated revenue purposes, and the manner in which those costs are allocated to a payor bears a fair or reasonable relationship to the payor’s burden’s on, or benefits received from, the governmental activity. *Id.* § 3(d); *California Bldg. Indus. Ass’n. v. State Water Res. Control Bd.* (2018) 4 Cal.5th 1032, 1046; *California Farm Bureau Fed’n v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 437. Reasonable costs “include all those incident to the issuance of a license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement.” *California Farm Bureau Fed’n*, 51 Cal. 4th at 438.

The Commission’s permit fees are categorized by the type of application and increase with a permit applicant’s total project cost (TPC). Appendix M, section (d)(1) defines TPC to mean:

“all expenditures, including the cost for planning, engineering, architectural, and other services, made or to be made for designing the project plus the estimated costs of construction of all aspects of the project both inside and outside the Commission’s jurisdiction.”

The application fees for most Commission permits have been based on TPC since 1975, when a definition of “total project cost” substantially identical to the existing definition was added to the Commission’s permit fee regulation. The current proposal to amend the permit application fee regulation would make no changes to the definition of “total project cost” or in the use of TPC to determine the applicable fee for most permit applications.

In 1975, it was determined that basing permit application fees on TPC was appropriate because the Commission's experience had shown that more costly projects were generally more complex and required the most detailed staff analysis. Staff also noted that the Commission's role in the California Environmental Quality Act (CEQA) review process supported basing application fees on TPC -- even though the Commission only votes on and issues a permit for those aspects of a project within its jurisdiction, the Commission and staff are required to analyze the entire project, if only as it affects the Commission's jurisdiction. In 1987, during a rulemaking process that included amendments to the permit fee regulation, the Commission reaffirmed that all costs of a project present the best basis for determining an application fee. Similarly, in 1991, in response to a comment that expressed concern with basing the application fee on TPC, submitted on proposed amendments to the permit fee regulation, the Commission reaffirmed that TPC is an easily ascertained and objective standard that reasonably reflects the amount of Commission staff time and resources that will be needed to review and process a permit application. Most recently, in 2008, the Commission rejected the suggestion, provided in a comment on proposed amendments to the permit fee regulation, that the Commission provide some flexibility in adjusting TPC in certain situations, such as when TPC includes project elements outside BCDC's jurisdiction and/or under the control of outside parties -- the response to this comment explained that, because the project as a whole must be evaluated and processed by the Commission and staff, the TPC should reflect all elements of the project.

Basing permit application fees on TPC is reasonable because fees determined in this manner are generally proportional to the regulatory costs incurred by the Commission and staff in reviewing and processing an application, with larger, more complex projects being assessed a higher fee than smaller, less complex projects. Basing permit application fees on TPC is also reasonable because under both the McAtter-Petris Act and CEQA, the Commission and staff are required to consider an entire project in processing a permit application, including, in those cases in which a portion of a project is located outside the Commission's jurisdiction, the relationships between the components of the project located inside and outside the Commission's jurisdiction, and the potential impacts of the portion located outside its jurisdiction on the portion inside its jurisdiction. Examples of such relationships may include, but are not limited to: the impacts of "upland" commercial or residential development on public access areas and open space in the shoreline band, and on views of the Bay and its shoreline; the protection to be afforded to "upland" development by shoreline improvements or sea level rise adaptation measures in the Bay or shoreline band; and stormwater management measures implemented in "upland" areas to minimize the discharge of pollutants to the Bay. In addition, basing permit application fees on TPC is reasonable because TPC is a readily available figure, whereas it may not be feasible, or may be difficult, to determine those costs associated with the portions of a project inside and outside the Commission's jurisdiction, respectively, or an applicant and staff may be

unable to agree on an appropriate allocation of such costs to different portions of the project, resulting in a dispute and associated delay in filing and processing an application.

Project costs is a widely-used and legitimate measure of the relative complexity of a project and the associated amount of staff time required to review and process a permit application. As discussed in the Initial Statement of Reasons, to compare the Commission's permit application fees to the permit fees charged by a number of other government agencies, staff surveyed the fee schedules of one state agency – the California Coastal Commission -- and a sampling of four Bay Area local governments -- the City and County of San Francisco; Contra Costa County; City of Berkeley; and City of Fremont. These agencies were chosen for comparison because their fee categories are relatively similar to the Commission's. The majority of these agencies' fees are flat fees based, at least in part, on total project construction or development costs. Moreover, like the Commission's regulation, the Coastal Commission's permit fee regulation defines the term "development cost" to include:

“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.*” (emphasis added). 14 C.C.R. § 13055(a)(5)(B).

For local governments, a proposed development project typically will be entirely within the county or city and, therefore, the fee schedules of the four Bay Area local governments surveyed do not address situations in which portions of a project might be both within and outside the agency's jurisdiction. However, for the Commission (and the Coastal Commission), where in some instances portions of a project may be both inside and outside its jurisdiction, basing permit application fees in part on project costs for areas outside the Commission's jurisdiction does not detract from the suitability of TPC as an appropriate measure of staff time and regulatory cost to review and process an application.

As also discussed in the Initial Statement of Reasons, the existing permit application fees were established with the goal of recovering from permit applicants, on an annual average basis, 20% of the total costs of the Commission's regulatory program. The proposed amendments to the permit fee regulation would increase from 20% to 40% the target revenue of the Commission's total regulatory program costs to be collected from permit fees. Thus, like the existing fees, the amended fees would continue to be directly related to the costs of the Commission's regulatory program, would not exceed the reasonable costs of that program, and would not be imposed for an unrelated revenue purpose. Moreover, because application fees based on TPC are generally proportional to the regulatory costs incurred in reviewing and processing an application,

the manner in which the costs of the Commission's regulatory program are allocated to permit applicants bears a fair or reasonable relationship to an applicant's burden's on, or benefits received from, the Commission's regulatory activity.

The commenter is incorrect in claiming that the Commission's permit fees impose a charge "for work done outside BCDC's jurisdiction" and requires "applicants to pay fees for development within BCDC's jurisdiction that are tied to the value of development outside BCDC's jurisdiction." The Commission's permit application fees are not a charge for work or for the value of development. Rather, as discussed above, the Commission's permit application fees are based on TPC because TPC is a reasonable measure of the regulatory costs incurred by the Commission and staff in reviewing and processing an application.

The purpose of the proposed amendments to the Commission's permit application fee regulation, as stated in the Initial Statement of Reasons, "is to double the amount of permit fee revenue generated by the Commission and deposited into the General Fund on an annual basis." The commenter has not identified any reasonable alternative that would be more effective in carrying out the purpose of the proposed amendments, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law governing the Commission's permit application fees. See Government Code sections 11346.5(a)(13) and 11346.9(a)(4).

18. **Comment 3B:** The United States Constitution requires that conditions associated with land-use permits, including fees, have a nexus with, and be at least roughly proportionate to, the impacts the project may have. Calculating fees based on a project's impacts outside BCDC's jurisdiction does not bear any nexus or rough proportionality to the project's impacts within BCDC's jurisdiction.

**Staff Response:** As the cases cited by the commenter demonstrate, the Takings Clause of the Fifth Amendment to the United States Constitution applies to conditions of project approval imposed by a government agency, including conditions requiring the dedication of land or the payment of a fee to mitigate project impacts. The United Supreme Court has held that there must be an "essential nexus" between a legitimate state interest (*i.e.*, the purpose of a permit condition) and the permit condition, and that a permit condition must be roughly proportionate to the impact to be addressed by the condition. See *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (condition of approval of permit to rebuild home required landowner to create public easement across property); *Dolan v. City of Tigard* (1994) 512 U.S. 374 (condition of approval of permit to expand store required owner to dedicate land for public floodway and pedestrian and bicycle pathway); *Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. 595 (condition of approval of permit to develop wetland parcel required landowner either to dedicate land through a conservation easement or pay a mitigation fee for the

conservation of wetlands); *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643 (condition of approval of a permit to rent all rooms in hotel to tourists or other daily renters, rather than to long-term residents, required owner to help replace the lost residential units by one of a number of specified methods, including payment of a mitigation fee into a government fund for the construction of low- and moderate-income housing).

As discussed in response to Comment 3A, above, which is incorporated herein by reference, the Commission charges permit application fees to recover a portion of the regulatory costs incurred by the Commission and staff in reviewing and processing permit applications. Such fees are imposed to recover a portion of the reasonable regulatory costs incident to issuing a Commission permit, not as a condition of project approval or to mitigate for project impacts. For these reasons, the cases cited by the commenter, and the principles of “essential nexus” and “rough proportionality” that govern conditions of project approval, do not apply to the Commission’s permit application fees.

The commenter is incorrect in claiming that the Commission’s permit fee regulation calculates fees “based on a project’s impacts.” As discussed above in response to Comment 3A, the Commission’s permit application fees are based on total project cost (TPC) because TPC is a reasonable and appropriate measure of the regulatory costs incurred by the Commission and staff to review and process an application. As also discussed in response to Comment 3A, the California Constitution authorizes the imposition of a charge or fee “for the reasonable regulatory costs to the State incident to issuing licenses and permits.” Cal. Const. art. XIII A, § 3(b)(3).

19. **Comment 3C:** The California Constitution, in Article XIII A, § 3 prohibits the State from imposing any “tax” (defined as any “charge”) that exceeds the “reasonable costs to the State of providing the service.” It is not reasonable for BCDC to charge applicants permit fees for development outside BCDC’s jurisdiction.

**Staff Response:** The commenter appears to suggest that charging a permit application fee based on total project cost (TPC) is not reasonable, and that such a fee may instead be a tax, in those cases in which a substantial portion of the TPC relates to the cost of proposed work or development for the portion of a project located outside the Commission’s jurisdiction. However, as discussed in response to Comment 3A, above, which is incorporated herein by reference, the California Constitution authorizes the imposition of a charge or fee “for the reasonable regulatory costs to the State incident to issuing licenses and permits.” Cal. Const. art. XIII A, § 3(b)(3). TPC is a reasonable and appropriate measure of the regulatory costs incurred by the Commission and staff in reviewing and processing a permit application. Moreover, the Commission’s permit application fees are directly related to the costs of the Commission’s regulatory program, do not exceed the reasonable costs of that program, and are not be imposed for an unrelated revenue purpose.

A Commission permit application fee would not be a tax even if, in a particular case, it could be argued that the fee does not bear a reasonable relationship to the benefit received by the applicant because a substantial portion of the TPC (and, therefore, the basis of the fee) relates to proposed work or development located outside the Commission's jurisdiction. A regulatory fee does not become a tax simply because the fee may be disproportionate to the services rendered to individual payors; the question of proportionality is not measured on an individual basis, but rather it is measured collectively considering all payors. *California Farm Bureau Fed'n*, 51 Cal.4th at 438 (fees for water rights permit or license, established to recover all costs incurred in connection with regulatory program, did not impose a tax); *California Ass'n of Prof'l Scientists v. Dep't of Fish & Game* (2000) 79 Cal. App. 4th 935, 939, 948 (flat fee imposed by the Legislature for environmental review by the Department of Fish and Game was not a tax); *Brydon v. East Bay Mun. Util. Dist.* (1994) 24 Cal. App. 4th 178, 194 (water rate fee structure adopted by utility was not a tax); see also *San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal. App. 3d 1132, 1135 (emissions-based formula adopted by air district to apportion costs of its permit program among stationary sources of air pollution was not a tax).

The commenter is incorrect in stating that the Commission charges permit application fees for "development outside BCDC's jurisdiction." The Commission's permit application fees are not a charge for development. Rather, as discussed above and in response to Comment 3A, the Commission's permit application fees are based on TPC because TPC is a reasonable measure of the regulatory costs incurred by the Commission and staff in reviewing and processing an application.

20. **Comment 3D:** The notice of the proposed rulemaking states that the new regulations would not have any significant effect on housing costs and identifies no adverse economic impacts. But charging housing developers significant permit fees for development done outside BCDC's jurisdiction is going to make housing development more expensive to build, thus discouraging new housing construction and making what housing is built more expensive. These economic impacts will be significant.

**Staff Response:** The Notice of Proposed Rulemaking, Initial Statement of Reasons, and Economic and Fiscal Impact Statement (Form 399), including the supplement thereto, contain considerable information regarding the estimated costs to permit applicants and anticipated economic impacts, as well as the benefits to the State of California, of the proposed amendments to the Commission permit application fee regulation to double the existing permit application fees. Under the current fees, for larger, more costly projects application fees range from 0.04% to 0.20% of the total project cost (TPC), depending on the type of application and the TPC. Under the proposed increased fees, the application fees for larger, more costly projects would range from 0.08% to 0.40% of TPC, depending on the type of application and the TPC. Thus, the proposed increase in fees would be a relatively small increase in costs to permit applicants when compared to the total cost of the projects for which applications are filed. Moreover, the increased fees would remain a small percentage or portion of an applicant's TPC.

The increased fees would continue to be paid on a one-time basis (upon submission of a permit application), and it is not expected that the increased fees would deter applicants from implementing proposed projects.

To estimate the impact of the proposed amended fees, the Commission staff conducted a survey of the permit applications filed during the five State fiscal years 2012/2013 through 2016/2017. The survey results were used to estimate the annual average fees and fee revenue from the proposed increased fees by type of permit application and type of applicant. Based on the survey results, staff estimates that the annual average fee revenue (and corresponding cost to permit applicants) from all applicants under the proposed increased fees would be approximately \$1,338,861, an increase of approximately \$669,430 from the annual average amount of fee revenue generated from the current fees. (The figure of \$1,338,861 is an annual average; staff expect the actual annual fee revenues would fluctuate each year, but over a five-year period, the fee revenue should reflect the annual average.) Most of the annual average increased fee revenue (and the cost of application fees) would be paid by an annual average of approximately 111 applicants for major permits, administrative permits, or permit amendments, resulting in an estimated average increased cost per applicant of approximately \$6,000. (See Supplement to the Economic and Fiscal Impact Statement, Attachment Five.) The survey results support the Commission's determination that the increased fees would not be significant compared to an applicant's TPC and would not result in significant adverse economic impacts directly affecting businesses or state or local agency permit applicants.

The commenter is incorrect in stating that the Commission charges "housing developers significant permit fees for development done outside BCDC's jurisdiction." The Commission's permit application fees are not a charge for development. Rather, as discussed in response to Comment 3A, which is incorporated herein by reference, the Commission's permit application fees are based on total project cost (TPC) because TPC is a reasonable and appropriate measure of the regulatory costs incurred by the Commission and staff to review and process an application.

The commenter provided no support for its claims that the proposed amendments to the Commission's permit application fee regulation will discourage new housing construction or that any economic effects of the proposed amendments will be significant. The proposed amendments to the Commission's permit application fee regulation is not a "major regulation" as defined in Government Code section 11342.548, and the Commission has determined, based on the information presented in the Notice of Proposed Rulemaking, Initial Statement of Reasons, and the Economic and Fiscal Impact Statement (Form 399), including the supplement thereto, that any effects on housing costs will not be significant.

## Attachment A

### Proposed Amendments to Appendix M

**Amend Appendix M as follows:**

**Title 14, Division 5, Appendix M**

**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) Permit Application Fees.

(1) Except as provided in subparagraph (b)(2), the following permit application fees shall be effective until ~~December 31, 2013~~ June 30, 2026 or until the Executive Director recalculates the fees under subsection (c), whichever is later.

<b><i>Type of Permit Application</i></b>	<b><i>Application Fee</i></b> <b><u>2008—2013</u> <u>2020-2026</u></b>
Abbreviated Regionwide Permit	<del>\$100</del> <u>200</u>
Regionwide Permit	<del>\$100</del> <u>200</u>
Time Extension for any permit	<del>\$150</del> <u>300</u>
Nonmaterial Amendment To <del>a Minor</del> <u>an Administrative</u> Permit Other Than a Time Extension With a Total Project Cost (TPC) of:	
—Less than \$5,000	<del>\$100</del> <u>200</u>
—\$5,000 to \$50,000	<del>\$150</del> <u>300</u>
—\$50,001 to \$100,000	<del>\$200</del> <u>400</u>
—\$100,001 to \$600,000	<del>\$300</del> <u>600</u>
—\$600,001 to \$100 million	<del>0.05</del> <u>0.10</u> % of TPC
—more than \$100 million	<del>\$100,000</del> <u>200,000</u>
Nonmaterial Amendment To a Major Permit Other Than a Time Extension With a TPC of:	
—Less than \$5,000	<del>\$100</del> <u>200</u>
—\$5,000 to \$50,000	<del>\$150</del> <u>300</u>
—\$50,001 to \$100,000	<del>\$200</del> <u>400</u>
—\$100,000 to \$600,000	<del>\$600</del> <u>1,200</u>
—\$600,001 to \$100 million	<del>0.10</del> <u>0.20</u> % of TPC
—more than \$100 million	<del>\$100,000</del> <u>200,000</u>
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~~ Administrative Permit with a total project cost (TPC) of:

—Less than \$5,000	<del>\$150</del> <u>300</u>
—\$5,000 to \$50,000	<del>\$175</del> <u>350</u>
—\$50,001 to \$100,000	<del>\$350</del> <u>700</u>
—\$100,001 to \$600,000	<del>\$1,050</del> <u>2,100</u>
—\$600,001 to \$10 million	<del>0.12</del> <u>0.24</u> % of TPC
—\$10,000,001 to \$50 million	<del>\$12,000</del> <u>24,000</u> or <del>0.10</del> <u>0.20</u> % of TPC, whichever is greater
—\$50,000,001 to \$100 million	<del>\$50,000</del> <u>100,000</u> or <del>0.08</del> <u>0.16</u> % of TPC, whichever is greater
—\$100,000,001 to \$300 million	<del>\$80,000</del> <u>160,000</u> or <del>0.06</del> <u>0.12</u> % of TPC, whichever is greater
—\$300,000,001 to \$600 million	<del>\$180,000</del> <u>360,000</u> or <del>0.04</del> <u>0.08</u> % of TPC, whichever is greater
—more than \$600 million	<del>\$240,000</del> <u>480,000</u>

Major Permit with a total project cost (TPC) of:

—Less than \$50,000	<del>\$350</del> <u>700</u>
—\$50,000 to \$100,000	<del>\$700</del> <u>1,400</u>
—\$100,001 to \$200,000	<del>\$900</del> <u>1,800</u>
—\$200,001 to \$300,000	<del>\$1,100</del> <u>2,200</u>
—\$300,001 to \$600,000	<del>\$1,200</del> <u>2,400</u>
—\$600,001 to \$10 million	<del>0.20</del> <u>0.40</u> % of TPC
—\$10,000,001 to \$50 million	<del>\$20,000</del> <u>40,000</u> or <del>0.17</del> <u>0.34</u> % of TPC, whichever is greater
—\$50,000,001 to \$100 million	<del>\$85,000</del> <u>170,000</u> or <del>0.14</del> <u>0.28</u> % of TPC, whichever is greater
—\$100,000,001 to \$300 million	<del>\$140,000</del> <u>280,000</u> or <del>0.11</del> <u>0.22</u> % of TPC, whichever is greater
—\$300,000,001 to \$600 million	<del>\$330,000</del> <u>660,000</u> or <del>0.08</del> <u>0.16</u> % of TPC, whichever is greater
—more than \$600 million	<del>\$600,000</del> <u>1,200,000</u>

(2) From the effective date of this regulation or July 1, 2020, whichever is later, through June 30, 2022, permit application fees shall be 75% of the amounts stated in subparagraph (b)(1). All fees calculated under this subparagraph (b)(2) shall be rounded up to the nearest dollar.

(c) Calculation of Permit Fees for Subsequent Years.

(1) For each five the three-year period following the effective date of this regulation, commencing in 2013 ending on June 30, 2025, and thereafter for the four-year period ending on June 30, 2029 and for each subsequent four-year period, the Commission will calculate:

- (A) the average fiscal year revenue generated from fees collected over the prior ~~five~~ three years;
- (B) the highest fiscal year total regulatory program costs (TRP) over the prior ~~five~~ three years;
- (C) ~~twenty~~forty 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~~ according to the method specified in subparagraph (c)(4) and the existing fees shall remain in effect until the Executive Director next recalculates new fees as provided in subparagraph (c)(1).
- (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 (c)(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~~ September 1 and no later than ~~October~~ December 31 of ~~2013~~2025, and in ~~five~~ four-year increments thereafter, the Executive Director shall calculate the fees that will apply to applications received in the following ~~five~~ four ~~calendar~~ fiscal 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~~ July 1 of the following calendar year and shall remain effective for ~~five~~ four 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) Fee Reduction for Project Costs Paid by a Grant from the San Francisco Bay Restoration Authority. For an application for a Major Permit, an Administrative Permit, or a Material Amendment to a Major or Administrative Permit for a project for which all or a portion of the Total Project Cost would be paid with a grant from the San Francisco Bay Restoration Authority from Bay Area Regional Measure AA (2016) funds, the amount of such grant shall be subtracted from the Total Project Cost and the difference shall be used in determining the permit application fee under section (b).

~~(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~~ Executive Director 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~~\$200 refund of an administrative permit application fee shall be made if the application is withdrawn prior to the mailing of the administrative listing for the application. No refund shall be made for an administrative permit application after listing.

- (2) For all other fees, the first ~~\$200~~400 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 enforcement 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.

## Attachment B

Memorandum Re: Potential Permit Fee Reductions for Projects  
that Receive San Francisco Bay Restoration Authority Grants

# San Francisco Bay Conservation and Development Commission

375 Beale Street, Suite 510, San Francisco, California 94105 tel 415 352 3600 fax 888 348 5190

State of California | Gavin Newsom – Governor | info@bcdc.ca.gov | www.bcdc.ca.gov

September 11, 2019

**TO:** Permit Fees Working Group

**FROM:** Marc Zeppetello, Chief Counsel (415/352-3655; marc.zeppetello@bcdc.ca.gov)

**SUBJECT: Potential Permit Fee Reductions for Projects that Receive San Francisco Bay Restoration Authority (“SFBRA”) Grants**

## I. ESTIMATED PERMIT FEE REVENUE FROM DOUBLING EXISTING FEES<sup>1</sup>

- A. Estimated Annual Average Fee Revenue from Existing Fees: \$669,430
- B. Estimated Annual Average Fee Revenue from Increased Fees: \$1,338,861
- C. Estimated Annual Average Increase in Fee Revenue: \$669,430

## II. FEES REDUCED FOR PROJECTS RECEIVING GRANTS (GRANT AMOUNT SUBTRACTED FROM TPC)

Number of Projects <sup>2</sup>	10
Total Permit Fees (Doubled Fees) if No Reduction	\$575,371
Total Permit Fees if Grant Amount Subtracted from TPC	\$498,307
Fee Reduction (Lost Revenue)	\$77,064
Average Percent Reduction per Permit	13.4%
Average Fee Reduction per Permit	\$7,706
Annual Fee Reduction (Lost Revenue) (Assume Applications Filed Over 2 Years)	\$38,532

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<sup>1</sup> These estimates of future permit fee revenue are based on the survey of permit application fees received during the five state fiscal years 2012/2013 through 2016/2017. See Supplement to Form 399, Economic and Fiscal Impact Statement (Feb. 14, 2019), at 3 and Attachment 5.

<sup>2</sup> The number of projects receiving grants in 2018 (in SFBRA’s first round of grants) is based on information available on the SFBRA website. Permit fees for those projects were calculated based on the total project cost of each project awarded a grant, as provided by the grant applicants, and assuming BCDC authorization by a major permit. If any projects awarded a grant were authorized by an administrative permit, the applicable permit fee would be less than for a major permit, and therefore, the fee reduction (and lost revenue) would be less than shown in this table.

## Attachment C

Public Comment Letters and Excerpt of the Minutes of the  
Commission's April 18, 2019 Meeting with Public Comments

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*Ramboll*
- Anju Wicke**  
*Geosyntec*
- Jeff Wingfield**  
*Port of Stockton*
- Kristine A. Zortman**  
*Port of Redwood City*
- John A. Coleman**  
*Chief Executive Officer*

April 17, 2019

San Francisco Bay Conservation and Development Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, CA 94102

RE: Proposed Rulemaking to Amend Permit Application Fees

Dear Chair Wasserman and Commissioners:

Bay Planning Coalition is a non-profit, policy advocacy organization with over 150 members across a range of industries who collectively advocate for strong economic growth while protecting the environmental sustainability of the region. Our members recognize the importance of the Bay Conservation & Development Commission's (BCDC) critical role in preserving and enhancing the San Francisco Bay ecosystem, and we understand the need for appropriate funding to achieve that mission. However, our members are concerned about the staff recommendation to double permit application fees due to the impact it would have on future restoration and development projects around the region and that BCDC fees are based on project cost, which inherently tracks with overall economic costs in California.

Our members are concerned that there is currently insufficient information available to evaluate the proposed doubling of permitting fees, in particular because the additional revenue received from any increase would go directly to the State with no guarantee of increases in funding to BCDC. Prior to approving any permit fee increase, our members urge BCDC staff to undertake a review of the permitting program that would identify existing inefficiencies in the permitting process overall. These inefficiencies have direct impacts on projects across the region, and on public agency, non-profit, and private applicants. For years, permittees have been subjected to onerous procedures that have resulted in unnecessary and costly delays in projects, and the enforcement policies have dissipated resources far beyond what is necessary for permit compliance. Our members would consider supporting a fee increase if it were accompanied by a commensurate exercise to improve efficiency and reduce current costs on the permit processing and enforcement side. For example, we would request the Commission to direct staff to bring back a proposal that would reduce staff costs associated with the permit processing program by at least 15%, before moving forward with any action on the fee increase. We also respectfully request that you delay the consideration of this item until the state audit of your agency has been completed and reviewed internally and externally, which may reveal opportunities to reduce costs associated with the permitting process.

Bay Planning Coalition is eager to be a supportive partner to help identify opportunities to streamline the permitting and enforcement processes so important waterfront projects throughout the Bay Area can move forward in a timely and cost-effective manner. We look forward to working with you on this task.

Sincerely,

John A. Coleman  
Chief Executive Officer



April 16, 2019

San Francisco Bay Conservation and Development Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, CA 94102

RE: Proposed Rulemaking to Amend Permit Application Fees

Dear Chair Wasserman and Commissioners:

Thank you for the opportunity to provide input into the proposal to increase permit fees at the BCDC. This letter is being submitted by the SF Bay Stewardship Alliance. First, we believe while the new fee structure appears reasonable given the comparisons, we also believe several important issues must be addressed during this public input period as part of any fee increase.

1. First, we believe NO ACTION should be taken on the permit fee structure until the pending report from the California State Auditor covering BCDC activities has been received and reviewed by the BCDC Commissioners and the public AND appropriate reforms as a result of the review are in place. **A**
2. It would appear the rationale for seeking an increase in fees is because the Department of Finance suggested it—this in turn because BCDC continues to overrun its budget. Does the Department of Finance in making this suggestion satisfy criteria under the Office of Administrative Law criteria? There is no useful analysis of "where and why" on the fees, just doubling everything, which is a serious error. **B**
3. BCDC has created many costly and time-consuming problems due to badly written permits and poor administrative processes. This leads to gross inefficiencies and seem intended to create enforcement opportunities. If applicants are to pay double the current fees, how does BCDC propose to improve its permit process and reduce the need for multiple amendments and other wasteful enforcement actions? We find no scenario which could justify the current backlog of over 250 enforcement actions, representing a majority of major permittees. The permit process clearly is flawed. **C**
4. Any change in fee structure should be accompanied by modernizing the BCDC permit process. We support the reform of the permitting process suggested by the Bay Planning Coalition, Sustainable Waterfronts Committee dated November 21,2017. The white paper and eight concrete recommendations can be found at: **D**  
**E**

[http://bayplanningcoalition.org/wp-content/uploads/2017/11/BPC-White-Paper\\_11212017-final-draft.pdf](http://bayplanningcoalition.org/wp-content/uploads/2017/11/BPC-White-Paper_11212017-final-draft.pdf) .

5. In analyzing the merits of a fee increase, one must look at both sides of the equation: **fees**, and the **costs** the fees are intended to offset. In the case of BCDC, the cost side is out of control. BCDC generate hundreds of meaningless actions with permittees, resulting in many permit amendments, numerous enforcement actions, and massive legal fees to justify, restate and try to justify trivial claims. **F**
6. More than a half-century ago, the McAteer Petris Act set a minimum \$20.00 cost to trigger an action (intended to control sand and shell mining in the Bay). BCDC has expanded its interpretation to *“any improvement exceeding \$20 requires authorization”*. (To quote on staffer, *“you need our authorization to move a potted plant”*). This is a meaningless amount in 2019 and serves only to generate *paper violations* which cause no harm the environment nor impact public access. They *do* serve to dissipate money and time which could be productively used, costing both the agency and permittees millions of dollars with no benefit. BCDC in updating its fees should at the same time increase the trigger a project amount from \$20.00 to a reasonable number (perhaps \$20,000) before authorization or permits are necessary. It is nonsense for the permit process to cost tens of thousands of dollars for an action as simple as replacing a \$200 gate or light fixture. **G**
7. All government--local, state or federal--cares about effective AND efficient public administration; without it, we don't have an embodiment of the public policies set. The original mission of BCDC is a public policy triumph over conflicting regional development policies, but requires a strong foundation of public administration. Current BCDC practices have led to waste, abuse and bad governance. BCDC is also quite inefficient. Using BCDC's sister agency for comparison, the California Coastal Commission is far more efficient, spending approximately **\$1.24** per foot of California shoreline annually (with a budget of \$22.4 M), and by most accounts is doing a better job. BCDC by comparison spends **\$11.30** for every foot of Bay shoreline annually (\$8M budget). This is *ten times more expensive for the same job* (based on public USGS and NOAA data of actual shoreline). Its noteworthy that BCDC publishes its own shoreline data and claims it is responsible for 50% of California's shoreline, an astonishing and grossly misleading overstatement! And the number of Coastal Commission amendments and enforcement actions are dwarfed by those of BCDC. **H**
8. The comparative data BCDC used to determine if the fees are comparable to other jurisdictions only compare *“new construction”*. What would the data show if it included remodels and *“minor”* repairs? In addition, the determination of fees did not include actual conversations with those who determine the fees in the other localities, a poor process. **I**
9. The methodology of determining if BCDC hits the goal of 40% of cost recovery uses a five-year average in collection of fees, but only using the highest annual total **J**

regulatory program cost. The criteria should be the same for both, otherwise it is setting up a situation where BCDC will always be below their 40% fee revenue goal.

10. The fee issue is another example where BCDC has not been doing their job. According to the report BCDC failed to do a review of fees in 2013. Also, BCDC is under an audit and losing court cases for its failed Enforcement process. When will the Commission recognize that it is responsible *for its staff, not to its staff*, and a leadership change is urgently needed? **K**
11. BCDC receives consistency determinations submitted by federal government agencies under the Coastal Zone Management Act but does assess fees. Shouldn't this work be deducted from the total regulatory program cost; otherwise local agencies are subsidizing the federal government. **L**
12. Currently, local governments pay the same fees as the private sector. There should be no changes in this rule as it would create a real conflict with the Commissioners who represent local government. **M**
13. Nowhere in the literature for the fee increases is there a clear definition of "Administrative" versus "Major" Permits. How is this determined? Who determines it and is there an appeal process? **N**
14. Have these fees and this process been submitted and reviewed by the Office of Administrative Law? **O**

In Summary:

- No action on fees should be taken until the report from the California State Auditor has been received and recommendations reviewed and implemented. **P**
- BCDC fee increases must correspond to the costs of associated with actions justifying the fees. A \$20 bar is far too low, and should be revised to a meaningful amount. **Q**
- Improvement in staff efficiency will improve the fiscal responsibility of BCDC far more than fee increases. **R**
- Streamlining the permitting process should be part of any changes in fee structure. This is fertile ground for correcting the budget failures, and reflects the fact that a majority of staff activity has no relevance to damage (or benefit) to the environment or public access, its primary charter, and calls for an overhaul of practices and policies. It cannot make sense to spend tens of thousands of hours and dollars over the size and color of chairs, the number of gates in a safety fence, the number of irrigation sprinklers, "illegal doggie bag dispensers", or parsing a single allegation into many for the simple purpose of racking up fees, to cite just a few very public bad examples. **S**

We look forward to an open public debate as the Commissioners implement fee and permitting reforms. **T**

Regards,

A handwritten signature in blue ink, appearing to read 'Bob', with a stylized, cursive script.

Bob

Co-Founder

SF Bay Stewardship Alliance

[www.baystewards.com](http://www.baystewards.com)

Wilson

CC: Senator Jerry Hill, Speaker Pro Tempore Kevin Mullins, California  
State Auditor

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Peter S. Prows  
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19 April 2019

*By Email Only*

Marc Zeppetello  
Chief Counsel  
San Francisco Bay Conservation and Development Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, CA 94102  
marc.zeppetello@bcdc.ca.gov

Subject: *Comments On Proposed Rulemaking To Amend Permit Application Fees*

Dear Mr. Zeppetello:

I write on behalf of a large residential developer client to comment on the proposed rulemaking to amend BCDC's permit-application-fee regulations, at 14 California Code of Regulations, Division 5, Appendix M.

The proposed permit-fee regulations tie permit application fees to "total project cost", even if some or most of a project is outside BCDC's jurisdiction. The proposed regulations define "Total project cost" as "all expenditures ... for ... all aspects of the project *both inside and outside the Commission's jurisdiction*". (Appendix M, paragraph (d), emphasis added.) The proposed regulations cite no authority justifying charging for work done outside BCDC's jurisdiction. This proposal to charge fees for work outside BCDC's jurisdiction raises serious statutory, constitutional, and economic problems.

**A**

**Statutory Concerns**

BCDC's jurisdiction is largely prescribed, and circumscribed, by the McAteer-Petris Act. That Act generally requires permits for development "within the area of [BCDC's] jurisdiction". (Gov. Code § 66632(a).) That Act authorizes BCDC to require "a reasonable filing fee and reimbursement of expenses for processing and investigating a permit application". (Gov. Code § 66632(c).) It is not reasonable to require applicants

to pay fees for development within BCDC's jurisdiction that are tied to the value of development outside BCDC's jurisdiction, or that value (for purposes of the fee calculation) development outside BCDC's jurisdiction equally to development within BCDC's jurisdiction. The permit fee schedule needs to be rethought to comply with the McAteer-Petris Act.

A

### **Constitutional Concerns**

The proposed new fees also raise constitutional concerns. The U.S. Constitution requires that conditions associated with land-use permits, including fees, have a nexus with, and be at least roughly proportionate to, the impacts the project may have. (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 391; *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 837; see *Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595, 626 (Kagan, J., dissenting) (*Nollan/Dolan* principles now apply to "permit conditions requiring monetary payments").) Calculating fees based on a project's impacts outside BCDC's jurisdiction does not bear any nexus or rough proportionality to the project's impacts within BCDC's jurisdiction. The proposed regulation violates the U.S. Constitution.

B

The California Constitution, in Article XIII A § 3 also prohibits the State from imposing any "tax" (defined as any "charge") that exceeds the "reasonable costs to the State of providing the service". (See also *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671 (land-use "fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development").) It is not reasonable for BCDC to charge applicants permit fees for development outside BCDC's jurisdiction. The proposed regulation violates the California Constitution.

C

### **Economic Concerns**

The notice of the proposed rulemaking states that the new regulations would not have any significant effect on housing costs, and identifies no adverse economic impacts. But charging housing developers significant permit fees for development done outside BCDC's jurisdiction is going to make housing development more

D

BRISCOE IVESTER & BAZEL LLP

Marc Zeppetello

19 April 2019

Page 3

expensive to build, thus discouraging new housing construction and making what housing is built more expensive. These unacknowledged economic impacts will be significant.

D

//

Thank you for considering these comments.

Sincerely,

BRISCOE IVESTER & BAZEL LLP

*/s/ Peter Prows*

Peter S. Prows

So assuming that the Commission does vote to take action and we go through this process, the fees would not actually be changed for three to nine months, and I would estimate likely by the first of January of 2020.

So I would be happy to answer any questions now or at the appropriate time. Thank you,

Chair Wasserman stated: Let's hold questions for the moment. I will simply observe that the wheels of the bureaucracies grind slowly but they grind exceedingly fine. (Laughter) The public hearing is open. We have two speakers.

Ms. Ashley LaBass addressed the Commission: I am a policy associate with the Bay Planning Coalition, a non-profit, policy organization with over 150 members who collectively advocate for strong economic growth while protecting the environmental sustainability of the region.

Our CEO John Coleman could not be here today due to a scheduled flight later this afternoon.

Our members recognize a need for appropriate funding to BCDC's critical role in preserving the San Francisco Bay ecosystem, however our members are very concerned about this proposal due to double permit fees because of the impact it would have on future restoration, development projects around the region. **A**

Prior to approving any permit fee increase our members respectfully urge BCDC staff to undertake a review of the permitting process program that would identify existing inefficiencies in the permitting process overall. **B**

The current procedures have resulted in unnecessary and costly delays in projects including for public agency, non- profit and private applicants.

We urge you to direct staff to draft a proposal that identifies opportunities to reduce staff costs associated with the permitting process by at least 15 percent and hopefully more before you can take action on this proposed fee increase. **C**

Our members would consider supporting a fee increase if it were accompanied by this corresponding exercise to streamline the permitting and enforcement processes.

We also respectfully ask that you delay the consideration of this item until the state audit of your agency has been completed and reviewed internally and externally which may reveal opportunities to reduce costs associated with the permitting processes. **D**

In conclusion these fee increases will have a major impact on projects looking to improve the economic and environmental vitality of the Bay Area. Increasing the permitting fees so drastically without the first careful consideration of the permitting and enforcement programs' efficiency could be detrimental to many proposed projects in the region. **E**  
**F**

Bay Planning Coalition is eager to be a supportive partner in identifying opportunities to streamline the permitting and enforcement processes. And as always the Bay Planning Coalition looks forward to working with you on this task. Thank you again for your time.

Mr. Bob Wilson was recognized: I am Co-founder of the San Francisco Bay Stewardship Alliance. The Alliance includes local citizens who care about the Bay.

We promote informed conservation and responsible development of the San Francisco Bay.

On April 16th the Alliance submitted detailed recommendations on the proposed increases in fees. The Executive Director has assured us it will be part of the record.

While we have tangled with the BCDC staff on many issues over the last year, a better matching of fees and regulatory costs is an area where surprisingly we believe we could find common grounds – but there is a however.

However we are on the record that urgent reforms are needed first. We urged the California state audit of BCDC. This audit appears close to conclusion and the Board was briefed this morning on the draft findings. We urge the full, unredacted report be made public.

Given that BCDC is at this critical juncture, the Alliance strongly urges the Board not to make changes in permit fees until the auditor's report has not only been made public but is considered and appropriate reforms are in place. **A**

Further, like the BPC we believe that streamlining the permitting process can yield significant cost savings. These would have far more impact than fee increases. **B**

In fact the Bay Planning Coalition made recommendations as far back as November of 2017 to improve the permit process and we support those recommendations – acting on these recommendations first before considering fee increases should be a priority of BCDC leadership. **C**

Cost reduction of regulatory practices and major process reform needs to be considered before fees are increased. We have many examples of opportunities. **D**

We would start by increasing the threshold for when permits are required. By law today that threshold is an incredible 20 dollars. **E**

An indicator of the breakdown in permitting and enforcement processes are that currently there are over 250 open enforcement cases based on permits issued in the BCDC backlog. Even staff admits resolving this massive backlog in the normal course is just not possible. **F**

And back in a recent Enforcement Committee meeting they recommended a significant amnesty program. I think there were nine different amnesty options they suggested to be considered. **G**

So unless there is reform, amnesty will be an ongoing issue. And for these reasons and others stated in our April 16th letter on the subject, now is not the time to increase fees. Thank you.

Chair Wasserman asked: Any questions or comments from the Commission?

Commissioner Gilmore commented: I am going to ask staff for a little bit of clarification on the potential to have new fees adjusted by a percentage change in the California Consumer Price Index.