

# San Francisco Bay Conservation and Development Commission

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## INITIAL STATEMENT OF REASONS

January 15, 2021

San Francisco Bay Conservation and Development Commission  
Proposed Changes to Commission Regulations, Title 14, Division 5

### Background

The San Francisco Bay Conservation and Developments Commission (“Commission” or “BCDC”) is a State agency that issues permits for: (1) the placement of fill, extraction of materials worth more than \$20, or any substantial change in use of any water, land, or structure located within the area of the Commission’s jurisdiction as established under the McAteer-Petris Act (“MPA”), California Government Code sections 66600 through 66694; and (2) any development within the area of the Commission’s jurisdiction as established under the Suisun Marsh Preservation Act (“SMPA”), California Public Resources Code sections 29000 through 29612. The Commission also considers: (1) requested amendments to the San Francisco Bay Plan, including a number of special area plans, the Suisun Marsh Protection Plan, and the Suisun Marsh Local Protection Program; and (2) appeals of any action by certain local government agencies on an application for a marsh development permit under the SMPA.

The Commission has adopted a set of regulations that are codified at Title 14 of the California Code of Regulations, Division 5, sections 10110-11990. The regulations cover a wide range of topics including, but not limited to: (1) general provisions; (2) the Commission, staff, and advisory review boards; (3) major permit procedures; (4) administrative and emergency permits; (5) amendments to permits; (6) special rules; (7) amendments to the San Francisco Bay Plan or other Commission plans; (8) certification of and amendments to the Suisun Marsh Local Protection Program; and (9) marsh development permits issued by local governments and appeals therefrom.

Based on a comprehensive review of the regulations, BCDC’s Chief Counsel, in consultation with staff, identified many necessary or desirable proposed amendments to the regulations. The proposed amendments relate to numerous administrative or procedural matters, issues related to permitting, and issues related to planning. On December 17, 2020, the Commission held a public hearing to consider a staff report and recommendation to commence the rulemaking process to amend certain regulations. Following the public hearing, the Commission voted to approve the staff’s recommendation and authorized staff to initiate the rulemaking process.

### Proposal and Rationale – Summary

In summary, the proposed amendments will: (1) clarify and revise certain requirements governing Commission meetings and adjudicatory proceedings; (2) clarify and revise the requirements applicable to the Commission’s advisory boards; (3) clarify and revise the



definitions of certain terms; (4) clarify the requirements for certain permit applications, the issuance of emergency permits, the contents of certain staff reports, and the findings to be made by the Commission in support of certain permitting actions; (5) clarify and revise the descriptions of activities that the Executive Director may authorize by an administrative permit; and (6) repeal certain outdated provisions that are no longer authorized by statute.

The objectives of the proposed amendments are to improve and update the Commission's administrative procedures, clarify certain permitting and planning requirements, and improve the clarity and consistency of the Commission's regulations. The proposed amendments will not impose any direct or indirect costs on individuals, businesses, local government agencies, or state agencies. The proposed amendments will incrementally reduce the Commission's administrative costs by allowing certain notices and other documents to be provided by electronic mail and posted on the Commission's website, rather than requiring that such notices and documents be mailed via United States mail, and by eliminating the need for a court report to attend and prepare full minutes of each Commission meeting.

The subjects of the proposed amendments and the regulations proposed to be amended are identified in the following lists which characterize the various proposed amendments as either: (1) administrative/procedural; (2) permitting; or (3) planning. This summary listing is followed by a section-by-section description of the proposed amendments.

**I. Administrative/Procedural**

- A. Revise requirements regarding recording Commission meetings and minutes of Commission meetings. Sections 10244 and 10245. (All section references are to the section of the Commission's regulations in Title 14 of the California Code of Regulations, Division 5.)
- B. Clarify and revise requirements regarding ex parte communications and disclosure of ex parte communications. Sections 10281, 10283, 10284, 10286, 10287, and 10288.
- C. Clarify and revise requirements regarding the function and membership of the Design Review Board ("DRB") and Engineering Criteria Review Board ("ECRB") and the submittal of materials for DRB and ECRB review. Sections: 10270, 10271, 10315, and 10316.
- D. Revise the regulation governing the distribution of an application for a major permit. Section 10360.
- E. Revise the regulation governing the contents of a resolution granting a major permit. Section 10501.
- F. Revise the regulation governing Commission findings on permits. Section 10514.

- G. Revise the regulation regarding applications for administrative permits. Section 10610.
- H. Revise the regulation governing the Executive Director's and the Commission's action on an administrative permit after listing. Section 10621.
- I. Revise a number of regulations to provide for certain notices or other documents that are currently required to be sent by regular mail to be mailed by email or first-class mail and also posted on the Commission's website. Sections 10213, 10214, 10504, 10505, 10620, 11001, 11002, 11005, 11020, 11101, 11202, 11203, 11204, and 11205.
- J. Revise a number of regulations to clarify that when there are two or more co-permittees, all permittees must sign any application or letter request for a permit amendment or amendment to a permit application. Sections: 10370, 10371, 10612, 10810 and 10820.

## II. Permitting

- A. Clarify and revise requirements related to the issuance of an emergency permit. Sections 10120, 10652 and 10653.
- B. Revise the regulation regarding Commission's Bay and certain waterways jurisdictions. Section 10121.
- C. Revise the regulation regarding areas excluded from Commission jurisdiction. Section 10123.
- D. Revise the regulation regarding what constitutes a substantial change in use. Section 10125.
- E. Revise the regulation that describes the categories of activities that constitute "minor repairs or improvements" that the Executive Director may authorize by an administrative permit. Section 10601.
- F. Revise the regulation regarding minor fills for improving shoreline appearance (specifically with respect to a pre-existing residential structure). Section 10701.
- G. Repeal the regulation regarding using the Bay as a "design asset." Section 10702.
- H. Repeal one regulation and a portion of a second regulation regarding a no-longer-authorized user fee for the disposal of dredged material. Sections 10521 and 10522.
- I. Add a new regulation regarding assignment of permits. Section 10830.

### **III. Planning**

- A. Revise the regulation governing the initiation of an amendment to the San Francisco Bay Plan or other Commission plan to clarify the agencies to receive copies of the brief descriptive notice. Section 11002.
- B. Revise the regulation governing the contents of the staff planning report on a plan amendment. Section 11003.
- C. Revise the regulation governing the contents of the staff planning recommendation on a plan amendment. Section 11005.
- D. Revise the regulation governing the payment of costs of processing an amendment to a Commission planning document. Section 11008.
- E. Revise the regulation governing Commission distribution of the Suisun Marsh Local Protection Program (“LPP”), a component thereof, or an amendment thereto. Section 11202.
- F. Revise the regulation governing the contents of the staff recommendation on an amendment to the Suisun Marsh LPP or a component thereof. Section 11205.
- G. Revise the regulation governing the contents of a marsh development authorization issued by a local government. Section 11420.
- H. Revise the regulation governing an appeal to the Commission of a marsh development authorization issued by a local government. Section 11421.

### **Proposal and Rationale – Section-by-Section Description of Proposed Amendments**

Following is a section-by-section description of the proposed amendments.

#### **Section 10120 -- Emergency**

The first sentence of section 10120 defines the term “emergency” as used in the MPA, the SMPA, and the Commission’s regulations. This definition would be amended to add the words “sudden” and “unexpected” to the description of a situation that poses an emergency. The second sentence of this section provides examples of situations that satisfy the definition of an “emergency” set forth in the preceding sentence, including “an accident, sabotage, vandalism, fire, flood, earthquake, or soil or geological movements.” All of these examples have in common the attribute that the phenomena they describe are sudden and unexpected. Thus, it is appropriate to insert the words “sudden” and “unexpected” in the definition of “emergency” in order to enhance the regulation’s clarity and internal consistency. In addition, adding the

words “sudden” and “unexpected” to the definition of “emergency” is intended to prevent property owners from avoiding or circumventing the Commission’s regular permitting application requirements and procedures by allowing shoreline protective devices and/or other structures to deteriorate over an extended period of time through neglect or deferred maintenance to the point where an “emergency” can improperly be claimed to exist that demands immediate corrective action that would need to be authorized by an expedited emergency permit issued under section 10652 of the regulations. Amending this section as proposed would also make the Commission’s regulations consistent with the Coastal Commission’s regulations defining “emergency” for purposes of permitting and with the CEQA Guidelines definition of the term “emergency.” See 14 C.C.R. §§ 13009 (Coastal Commission regulation defines emergency as a “sudden unexpected occurrence”) and 15359 (CEQA Guidelines defines emergency as a “sudden, unexpected occurrence”). (Guidelines for Implementation of the California Environmental Quality Act, commonly referred to as the CEQA Guidelines, are codified at Title 14 of the California Code of Regulations, Division 6, Chapter 3.)

### **Section 10121 -- San Francisco Bay and Certain Waterways Jurisdiction**

Subsection 10121(a) currently states that in areas of tidal marsh, the inland extent of the Commission’s San Francisco Bay jurisdiction, as defined in Government Code section 66610(a), is at “five feet above mean sea level.” This statement does not correctly reflect the language of Government Code section 66610(a), which provides that in areas of tidal marsh the landward limit of the Commission’s area of San Francisco Bay jurisdiction is the inland extent of tidal marsh or five feet above mean sea level. The proposed amendment corrects the language of subsection 10121(a), by referring to the upland edge of tidal marsh up to five feet above sea level, so that it accurately reflects both Government Code section 66610(a) and Government Code section 66610 (e) (providing that the area of the Commission’s certain waterways jurisdiction in marshlands is “up to five feet above mean sea level.”

Subsection 10121(b) describes the bodies of water included in the Commission’s “San Francisco Bay” and “certain waterways” areas of jurisdiction, as established by Government Code sections 66610(a) and 66610(e), respectively. The proposed change adds to subsection 10121(b) the critical jurisdictional criterion from these statutory provisions that what brings a body of water within the Commission’s San Francisco Bay and certain waterways jurisdiction is the attribute of being “subject to tidal action” or tidal influence.

Subsection 10121(c) defines and lists examples of waterways that are included within the Commission’s San Francisco Bay area of jurisdiction because, even though they are known by different names, they are hydrologically connected to the Bay. The proposed changes to this subsection include: (1) adding the critical jurisdictional criterion from Government Code section 66610(a) that the Commission’s San Francisco Bay area of jurisdiction extends to all portions of waterways that are hydrologically connected to the Bay because they are subject to “tidal action” or tidal influence; and (2) describing the hydrological connection as being that these tidally-influenced waterways “flow into” the Bay.

### **Section 10123 -- Areas Excluded from Commission Jurisdiction**

Subsection 10123(a) recognizes that areas exist that were historically subject to but removed from tidal action by the construction of dikes, levees, or other man-made structures prior to the creation of the Commission and its jurisdiction pursuant to Government Code section 66610. This regulation further recognizes that these areas should not become subject to the Commission's jurisdiction immediately if such man-made structures are damaged or destroyed by natural causes and the areas behind them once again become subject to tidal action. This regulation balances the public interest in the Bay and the Commission's exercise of its jurisdiction, on the one hand, and a property owner's interest in the regulatory status of the owner's property not changing solely due to the naturally-caused destruction of a man-made structure, on the other hand, by allowing up to one year, or such longer period as may be specified by the Commission, to repair a dike, levee, or other structure before the Commission obtains jurisdiction.

However, as presently written this section inappropriately puts the burden on the Commission to both learn of the natural destruction of a man-made structure and notify the property owner of the potential extension of the Commission's jurisdiction. The Commission and its staff are not in the position and do not have the resources to monitor or otherwise learn of the condition and potential destruction of man-made structures along the entire perimeter of the areas of the Commission's "Bay" and "certain waterways" jurisdictions and to then identify and notify potentially affected property owners. In contrast, individual property owners are in the best position to know the condition of and learn about damage to or destruction of dikes, levees, or other structures on the owner's property. The property owner also has the incentive to undertake repairs to any damaged or destroyed structures in a timely manner if the owner desires to maintain the property in, or restore the property to, the condition it was in prior to the natural damage to or destruction of such structures.

For these reasons, this subsection would be amended to provide that an area that would fall within the Commission's jurisdiction only as the result of the natural destruction of a man-made structure shall remain excluded from the Commission's either: (1) for a one-year period after the event or occurrence causing the natural destruction; and (2) for such longer period as may be specified by the Commission after the affected property owner gives written notice to the Commission of the event or occurrence causing the natural destruction of a man-made structure and provides an estimate of the time that will be required to complete the repairs. The amended regulation would require a property owner requesting more than one year to complete the necessary repairs to provide the Commission written notice within 180 days of the event or occurrence causing the natural destruction of the man-made structure and also provide an estimate of the time that will be required to complete the repairs. Given that a property owner is presumed to be knowledgeable about the condition of and have a substantial interest in maintaining his or her property, the Commission believes that a 180-day notice period is reasonable and sufficient for a property owner to learn of the natural destruction of a

man-made structure on the owner's property and to determine what will be necessary to repair the structure and estimate the time that will be required to do so.

### **Section 10125 -- Substantial Change**

Government Code section 66632(a) requires a permit from the Commission "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." Section 10125 of the regulations describes what is encompassed by the term "substantial change in use" under Government Code section 66632(a) as applied to the different areas of the Commission's jurisdiction established by Government Code section 66610. Subsection 10125(a) describes what is included as "substantial change in use" as to any salt pond or managed wetland, and subsection 10125(b) describes "substantial change in use" as to all other areas of the Commission's jurisdiction (*i.e.*, Bay, shoreline band, and certain waterways). The Commission proposes to amend Subsection 10125(b) in a number of respects.

First, the introductory clause of subsection 10125(b) would be amended to clarify that the terms "construction," "reconstruction," and "alteration" all relate to changes to "a structure" and that, in addition to any such changes to a structure, the section also requires independent consideration of "any other activity, whether or not involving a structure." Second, the introductory clause of section 10125(b) would be amended to clarify that the five subsections 10125(b)(1) through (b)(5) are to be considered both as to: (1) any construction, reconstruction, or alteration of a structure; or (2) any other activity, whether or not involving a structure.

Third, subsection 10125(b)(1) would be amended to increase the estimated cost threshold for a substantial change in use from \$250,000 to \$500,000. The Port of San Francisco requested this change in a letter to the Commission's Chief Counsel dated October 17, 2019 and suggested that the increased cost threshold is warranted due to both inflation and increased construction costs since this regulation was last amended in 1996. The Commission concurs that this change is warranted for the reasons stated by the Port of San Francisco.

Fourth, as currently written, subsection 10125(b)(2) refers only to "a structure" or "land" in describing a change in the general category of use. This section would be amended to add "water" to the existing references to "a structure" and "land." The addition of "water" to this subsection is necessary to make this regulation consistent with the statutory language of Government Code section 66632(a), which requires a Commission permit for, among other things, "any substantial change in use of any water, land, or structure."

Fifth, subsection 10125(b)(3) would be amended to clarify that a substantial change in the intensity of use could be either a substantially greater or a substantially lesser change in intensity of use.

Sixth, as currently written, subsection 10125(b)(4) is ambiguous as to whether, to constitute a substantial change in use, any adverse effects on public access must be to either existing or future public access as shown on a Commission permit or Commission planning document. Subsection 10125(b) would be amended to insert the subdivision (i) before the words “existing public access” and subdivision (ii) before the words “future public access,” to clarify the Commission’s existing interpretation of this section that it is only “future public access” (as distinguished from “existing public access”) that must be shown on a Commission permit or planning document in order for an adverse effect on such access to constitute a “substantial change in use.” Thus, this amendment would clarify that adverse impacts to any existing public access would constitute a substantial change in use and that adverse impacts to future public access as shown on any Commission permit or planning document would constitute a substantial change of use.

### **Section 10213 -- Meeting Notice**

Section 10213 requires that written notice of the time and place of a regularly scheduled Commission meeting and a preliminary agenda be sent by “first class mail” or by alternative means (by telephoning each Commissioner and each Alternate and by publishing notice in a newspaper) if an interruption in regular mail service occurs. In order to take advantage of currently available more time-efficient and less costly methods of providing notice of a meeting and a meeting agenda, section 10213 would be amended to allow providing notice of a meeting and a meeting agenda by first class mail or by electronic mail (email), and to also provide for posting this information on the Commission’s website. The proposed changes reflect current practice in that, with the consent of the party to receive a meeting notice and agenda electronically, the Commission has for a number of years provided meeting notices and agendas by email and has also posted this information on its website not less than 10 days prior to each regularly scheduled Commission meeting. With the proposed change, the Commission would continue to provide notice of a meeting and a meeting agenda by email only with the consent of the party to receive this information electronically (with such consent provided through furnishing one’s email address to Commission staff) and would continue to provide notice of a meeting and a meeting agenda by first class mail to parties requesting to receive this information by mail. Providing notice of a meeting and a meeting agenda by email, and by posting this information on the Commission’s website, eliminates the need for the availability of the alternative methods of notice by telephone or by publication to which section 10213 at present refers. The Commission therefore proposes to delete from section 10213 the references to such alternative methods of notice.

The proposed changes to section 10213, and to a number of other regulations discussed below (*i.e.*, sections 10214, 10504, 10505, 10620, 11001, 11002, 11005, 11020, 11101, 11202, 11203, 11204, and 11205), to allow certain notices or other documents to be provided by email or first class mail and posted on the Commission’s website, would reduce the Commission’s environmental footprint by reducing the usage of paper and the usage of fossil fuels associated with mail delivery. The proposed amendments to all of these sections would also incrementally

reduce the Commission's administrative costs for copying and mailing paper copies of certain notices and other documents by allowing such notices and documents to be provided by electronic mail and posted on the Commission's website, rather than requiring that such notices and documents be mailed via United States mail.

#### **Section 10214 -- Who Shall Receive Notice**

Section 10214 identifies the parties to whom the notice required by section 10213 is to be mailed. Consistent with the above-described proposed amendment to section 10213, section 10214 would be amended to state that notice shall be mailed or sent by electronic mail, as an additional option to provide notices of meetings and agendas, and to indicate that the Executive Director may require any party requesting notice by electronic mail to provide the person's email address.

#### **Section 10244 -- Recording of Meetings**

Section 10244 provides that Commission meetings shall be recorded electronically, and that staff shall retain each recording for at least one year and make the recording available for replaying at the Commission's offices. Given the prevalence and ease of internet access, this section would be amended to state that, in addition to making the recording of a Commission meeting available for replaying at the Commission's offices, staff shall also post or provide access to the recording of each Commission meeting on the Commission's website.

In addition, the Authority and Reference note would be amended to add a references to Government Code sections 11124.1(b), which provides that any recording of an open and public meeting of a state body made by such a body shall be retained for 30 days and available for inspection on equipment made available to the public by the state body.

#### **Section 10245 -- Minutes of Meetings**

This section provides that the Commission shall keep full and accurate minutes of its meetings and that the minutes as signed by the Executive Director and Chair shall be the original evidence of actions taken by the Commission. For a number of reasons: (1) subsection 10245(a) would be amended to provide that the Commission shall keep accurate minutes of all Commission actions taken and its meetings; and (2) subsections 10245(a) and (b), which provide that the Executive Director and Chair shall sign the minutes and that the that the signed minutes shall be the original evidence of actions taken by the Commission, respectively, would be deleted. First, the Bagley-Keene Open Meeting Act does not require a state body to prepare or maintain minutes of the state body's meetings, except that for closed sessions minutes are required to provide a record of the topics discussed and any decisions made. See Gov't Code § 11126.1. Second, the electronic recording of a Commission meeting that is made and will continue to be made pursuant to section 10244 of the regulations is sufficient to provide a full and accurate record of a Commission meeting. If necessary in certain circumstances, a written

transcript of some or all of a Commission meeting can be made from the electronic recording. Finally, the proposed amendments would allow the Commission to avoid the costs of retaining a court reporter to attend and separately record (in addition to the recording made by staff) each Commission meeting and then prepare complete written minutes of essentially everything said on the record at each meeting.

### **Section 10270 -- Membership and Function of Design Review Board**

This section addresses the membership and function of the Design Review Board (“DRB”), one of the Commission’s advisory bodies. This section would be amended in a number of respects to provide clarity regarding DRB membership and the standards governing the DRB.

First, subsection 10270(d) would be amended to state that the Commission Chair may designate with the concurrence of the Commission up to seven individuals to serve as a pool of alternates to substitute for current members who cannot participate in any DRB meeting, rather than the Commission itself designating such alternates. This process for designating alternates reflects the process for designation of members of the DRB in accordance with regulation section 10250(b).

Second, subsection 10270(d) would also be amended to eliminate the current limitation that restricts the pool of alternates to former DRB members. Experience has demonstrated that, after serving on the DRB for many years, former DRB members may have little interest in continuing to serve as alternates or may be unavailable to do so. Restricting the pool of alternates to former DRB members has resulted in there being too few alternates available to substitute for current members and situations where there have been difficulties with having a quorum of DRB members (including alternates) for particular meetings. Amending this section to broaden the pool of alternates to include qualified individuals who have not previously served on the DRB is intended to eliminate these problems and also assist in the recruitment of prospective future DRB members.

Third, subsection 10270(e) would be amended to delete the reference to a pool of alternates being established “by the Commission” and instead simply refer to the pool established pursuant to subsection 10270(d).

Fourth, subsection 10270(h) would be added to specify five years as the length of the term of appointment to the DRB and that such term may be renewed for two successive five-year periods. Section 10270 is currently silent on length of the term of appointment to the DRB and, therefore, this amendment would provide clarity on that issue.

Fifth, subsection 10270(i) would be added to state that DRB members are subject to the Commission’s regulations relating to ex parte communications (14 C.C.R. §§ 10280-10289.) By their terms, the Commission’s regulations relating to ex parte communications apply only to Commissioners. However, the same considerations that support the applicability of these

regulations to Commissioners (see regulation section 10280) apply with equal validity to members of the Commission's advisory boards, including the DRB. Moreover, in practice, Commission counsel have consistently advised DRB members that these regulations apply to them. Therefore, reflecting ongoing practice, this amendment will expressly make DRB members subject to the Commission's regulations regarding ex parte communications.

### **Section 10271 -- Membership and Function of Engineering Criteria Review Board**

This section addresses the membership and function of the Engineering Criteria Review Board ("ECRB"), one of the Commission's advisory bodies. This section would be amended in a number of respects to provide clarity regarding ECRB membership and the standards governing the ECRB. In addition, this section would be amended to provide an equivalent level of detail regarding the membership and functioning of the ECRB as is provided in section 10270 for the DRB.

Currently, the first sentence of section 10271 specifies the qualifications of certain members of the ECRB, and the second sentence of this section describes the problems relating to the safety of fills on which the ECRB advises the Commission. Section 10271 would be amended to create two subsections from the existing text -- section 10271(a) to address the qualifications of certain ECRB members and section 10271(b) to describe the problems on which the ECRB advises the Commission. The new section 10271(a) would add one "coastal engineer" to the list of professional qualifications that are required to be represented on the ECRB. This change will enhance the ECRB's ability to address issues relating to the critical challenges associated with adaptation to sea level rise.

The new subsection 10271(b) would clarify that the ECRB shall advise the Commission on problems relating to the safety of fill and of structures on fill on projects within the Commission's Bay or certain waterways jurisdictions for which a Commission permit or consideration of a consistency determination is needed. These changes reflect current and past practice as to the scope of the ECRB's review of projects, consistent with the policy governing further filling of the Bay and certain waterways established by Government Code section 66605(e), which requires "that fill be constructed in accordance with sound safety standards."

New subsection 10271(c) would be added to specify that six members shall constitute a quorum for ECRB meetings and shall be the minimum necessary for the ECRB to consider any matter. These additions are intended to provide clarity regarding the standards for the ECRB and to make section 10271(c) consistent with the analogous section 10270(c) governing the DRB.

New subsection 10270(d) would be added to state that the Commission Chair may designate with the concurrence of the Commission up to seven individuals to serve as a pool of alternates to substitute for current members who cannot participate in any ECRB meeting, rather than the Commission itself designating such alternates. This process for designating alternates reflects

the process for designation of members of the ECRB in accordance with regulation section 10250(b).

New subsection 10271(e) would be added to provide that when fewer than all eleven members will be available to participate in the ECRB's consideration of a matter, the Executive Director may designate one or more alternate members selected from the pool of alternates established by subsection 10271(d) to substitute for the member or members who cannot participate in the ECRB's consideration of the matter. This addition is intended to provide clarity regarding the process for the Executive Director to designate alternates to substitute for unavailable ECRB members and to make subsection 10271(e) consistent with the analogous subsection 10270(d) governing the DRB.

New subsection 10271(f) would be added to state that when designating an alternate ECRB member pursuant to paragraph subsection 10271(e), the Executive Director shall select an individual in a professional discipline and with professional experience as much as possible like those of the member who cannot participate in the ECRB's consideration of a particular matter. This addition is intended to provide clarity regarding the standard to be applied by the Executive Director in designating alternates to substitute for unavailable ECRB members and to make subsection 10271(f) consistent with the analogous subsection 10270(f) governing the DRB.

New subsection 10271(g) would be added to state that alternate members designated pursuant to sections 10271(e) and (f) shall have the same powers and authority to participate in the ECRB's consideration and action on any matter as a regular ECRB member. This addition is intended to provide clarity regarding the authority of alternates to participate in the ECRB's consideration of any matter in the same manner as regular ECRB members and to make subsection 10271(g) consistent with the analogous subsection 10270(g) governing the DRB.

New subsection 10271(h) would be added to specify five years as the length of the term of appointment to the ECRB and that such term may be renewed for two successive five-year periods. Section 10271 is currently silent on length of the term of appointment to the DRB and, therefore, this amendment would provide clarity on that issue.

Finally, new subsection 10271(i) would be added to state that ECRB members are subject to the Commission's regulations relating to ex parte communications (14 C.C.R. §§ 10280-10289.) By their terms, the Commission's regulations relating to ex parte communications apply only to Commissioners. However, the same considerations that support the applicability of these regulations to Commissioners (*see* regulation section 10280) apply with equal validity to members of the Commission's advisory boards, including the ECRB. Moreover, in practice, Commission counsel have consistently advised ECRB members that these regulations apply to them. Therefore, reflecting ongoing practice, this amendment will expressly make ECRB members subject to the Commission's regulations regarding ex parte communications.

**Section 10281 – Definition of an Ex Parte Communication.**

The Commission regulations on ex parte communications implement provisions of the Government Code governing ex parte communications in adjudicatory proceedings that apply to all state agencies. Gov't Code §§ 11430.10-11430.80. Section 10281 defines an ex parte communication as any communication regarding a pending adjudicatory proceeding between a member of the Commission and either any party to the pending proceeding or a member of the public that does not occur in a Commission public hearing or meeting or on the official Commission record for the proceeding. The Commission proposes to amend section 10281 in a number of respects.

First, the existing text, as amended, would become part of a new subsection 10281(a). Second, the existing text would be amended to clarify that an ex parte communication is any oral or written communication, whether “direct or indirect,” regarding a pending adjudicatory proceeding. Third, a sentence would be added to clarify that, except as provided in the new subsection 10281(b), discussed below, an ex parte communication includes any communication to a member of the Commission from any party to a pending adjudicatory proceeding or from a member of the public concerning such a proceeding whether or not the Commissioner receiving the communication responds thereto.

Fourth, a new subsection 10281(b) would be added to address the inherent tension between the public's free speech rights to address the Commission, as a state body that makes adjudicatory decisions in open public meetings, and the prohibition on ex parte communications. The first sentence of subsection 10281(b) would acknowledge that the Commission is required by law to provide an opportunity for members of the public to address the Commission on items to be considered by the Commission, including pending adjudicatory proceedings, before or during the Commission's consideration of the item. The second sentence of this subsection would provide that, in light of the public's right to address the Commission, an ex parte communication does not include a letter, email message, or other written communication to the Commission or a member of the Commission commenting on a pending adjudicatory proceeding if the communication is included in the official Commission record for the proceeding and provided that the Commissioner receiving the communication does not respond to it.

Fifth, a new subsection 10281(c) would be added to provide that if the Executive Director is copied on a letter, email, or other written communication to the Commission or a member of the Commission, or if the Executive Director has received such a communication as a public comment submission to the Commission, the Executive Director shall include the communication in the official Commission record for the proceeding and distribute it to the Commission prior to the Commission's consideration of the subject of the communication, and no Commissioner shall have an obligation to disclose the communication. Subsection 10281(c)

would further provide that if such a communication is addressed to one or more members of the Commission individually and is not copied to or received by the Executive Director, any Commissioner receiving such a communication shall forward it to the Executive Director, who shall include the communication in the official Commission record for the proceeding and shall distribute it to the Commission prior to the Commissioner's consideration of the matter that is the subject of the communication, and no Commissioner shall have an obligation to disclose the communication.

Finally, the Authority and Reference note would be amended to add references to Government Code sections 11125.7 and 66641.6 and Public Resources Code sections 29610-29611. Government Code section 11125.7 is a provision of the Bagley-Keene Open Meeting Act which provides, in part, that a state body is required to provide an opportunity for members of the public to address the state body on each agenda item noticed for a meeting of the state body before or during the state body's consideration of the item. Government Code section 66641.6 authorizes the Commission, after hearing, to issue an enforcement order setting administrative civil liability and Public Resources Code sections 29610-29611 are the penalty provisions of the SMPA. Commission enforcement proceedings that may result in the imposition of administrative civil liability are adjudicatory proceedings subject to the Commission's regulations on ex parte communications.

### **Section 10283 -- General Policy and Disclosure of Ex Parte Communications**

Section 10283 of the regulations sets forth the Commission's general policy regarding ex parte communications and the requirements for the disclosure of such communications in accordance with those Government Code provisions. The Commission proposes to amend section 10283 in a number of respects to clarify its general policy regarding and requirements governing ex parte communications.

First, subsection 10283(a) would be amended to clarify that ex parte communications are prohibited in adjudicatory proceedings except as provided in section 10284, which lists certain permissible ex parte communications. In addition, the second sentence of this subsection would be amended to delete the reference to prohibited communications and provide that if an impermissible ex parte communication occurs, any Commission member who receives or engages in such a communication concerning any adjudicatory matter pending before the Commission shall disclose the content of the communication.

Second, subsection 10283(b) would be amended to clarify that the disclosure of an ex parte communication must occur in writing as provided in subsections 10283(c) or (d) prior to the Commission meeting at which it considers the matter that is the subject of the ex parte communication or during that meeting prior to the Commission's consideration of the agenda item that is the subject of the communication.

Third, subsections 10283(c) and (d) would each be amended for consistency and clarity to provide that compliance with the applicable disclosure requirement for receipt of an ex parte communication in written form or orally, respectively, shall be accomplished in by providing specified documentation to the Executive Director “as soon as practicable after the communication for inclusion into the record of the matter that is the subject of the ex parte communication.”

Finally, the Authority and Reference note would be amended to add references to Government Code section 66641.6 and Public Resources Code sections 29610-29611. Government Code section 66641.6 authorizes the Commission, after hearing, to issue an enforcement order setting administrative civil liability and Public Resources Code sections 29610-29611 are the penalty provisions of the SMPA. Commission enforcement proceedings that may result in the imposition of administrative civil liability are adjudicatory proceedings subject to the Commission’s regulations on ex parte communications.

#### **Section 10284 -- Permissible Ex Parte Communications**

This section lists a number of types of ex parte communications that are not prohibited and do not require any type of disclosure into the record. Subsection 10284(c) would be amended to replace the words “pre-adjudicative state,” which are unclear and appear to reflect a typographical error, with the words “in its pre-adjudicative stage.” Based on the terms of Government Code section 11430.30, which is one of the statutory references for this regulation, the word “state” as used in this subsection is a typographical error. Government Code section 11430.30 provides that a permissible ex parte communication from an employee or representative of any agency that is a party to a proceeding includes a communication for the purpose of advising the presiding officer from a person who has not served as investigator, prosecutor, or advocate “in the proceeding or its preadjudicative stage.”

In addition, the Authority and Reference note would be amended to add references to Government Code section 66641.6 and Public Resources Code sections 29610-29611. Government Code section 66641.6 authorizes the Commission, after hearing, to issue an enforcement order setting administrative civil liability and Public Resources Code sections 29610-29611 are the penalty provisions of the SMPA. Commission enforcement proceedings that may result in the imposition of administrative civil liability are adjudicatory proceedings subject to the Commission’s regulations on ex parte communications.

#### **Section 10286 -- Notification of Parties and Interested Persons**

The first sentence of subsection 10286(a) currently provides that the Executive Director shall, as soon as is practicable, notify in writing all interested parties that a Commissioner has received an impermissible ex parte communication. This sentence would be amended to: (1) clarify that all interested parties shall be notified of such a communication as soon as practicable and prior to the Commission’s consideration of the matter that is the subject of the ex parte

communication; and (2) delete the text providing that the Executive Director shall provide such notice in writing. The proposed deletion is necessary because the manner of providing notice and who shall provide notice will depend on whether the disclosure occurs prior to or at the Commission meeting at which the Commission considers the matter that is the subject of the ex parte communication. Thus, subsection 10286(a) would also be amended to clarify that: (1) if the disclosure occurs prior to the Commission meeting, the Executive Director shall provide notice by mail or email and by posting notice of the disclosure on the Commission's website with the materials for that Commission meeting; and (2) if the disclosure occurs at the Commission meeting at which the Commission will consider the matter that is the subject of the ex parte communication, the disclosure shall occur in writing as provided in subsections 10283(c) or (d), as applicable, and notice of the disclosure shall be provided orally by the Commissioner making the disclosure prior to the Commission's consideration of the matter that is the subject of the communication.

Subsection 10284(b) would be amended for clarity by adding the word "as" toward the end of the sentence so that it reads, "...include a copy of the memorandum and any response to the communication as required by Sections 10283(d) and (e) with the written notification."

Subsection 10284(c) would be amended to clarify that if the communication was received in writing, the Executive Director's notification shall include a copy of the written communication "and any response to the communication as required by section 10283(c)."

Subsection (d) would be amended to clarify that the Executive Director's notice shall state that the party or person being notified may request an opportunity to address the Commission concerning the communication at the Commission meeting at which the Commission considers the matter that is the subject of the communication and must request such an opportunity within 10 days of receiving the notice or the party or person shall waive the opportunity to address the Commission. The 10-day post-notice period for an interested party to request to address the Commission regarding an ex parte disclosure is required by Government Code section 11430.50.

In addition, the Authority and Reference note would be amended to add references to Government Code section 66641.6 and Public Resources Code sections 29610-29611. Government Code section 66641.6 authorizes the Commission, after hearing, to issue an enforcement order setting administrative civil liability and Public Resources Code sections 29610-29611 are the penalty provisions of the SMPA. Commission enforcement proceedings that may result in the imposition of administrative civil liability are adjudicatory proceedings subject to the Commission's regulations on ex parte communications.

### **Section 10287 -- Party Opportunity to Respond to an Ex Parte Communication**

Consistent with the proposed amendments to subsection 10284(d) discussed above, section 10287 would be amended to clarify that a party may request an opportunity to address the

Commission concerning an ex parte communication at the Commission meeting at which the Commission considers the matter that is the subject of the communication or within 10 days of receiving notice of the communication.

In addition, the Authority and Reference note would be amended to add references to Government Code section 66641.6 and Public Resources Code sections 29610-29611. Government Code section 66641.6 authorizes the Commission, after hearing, to issue an enforcement order setting administrative civil liability and Public Resources Code sections 29610-29611 are the penalty provisions of the SMPA. Commission enforcement proceedings that may result in the imposition of administrative civil liability are adjudicatory proceedings subject to the Commission's regulations on ex parte communications.

**Section 10288 -- Ex Parte Communications After the Close of the Public Hearing and After the End of the Time Period for Receipt of Written Communications; Public Comments and Responses.**

Subsection 10288(a) currently provides that if an oral ex parte communication occurs after the close of the public hearing or if a written ex parte communication occurs after the deadline for submitting written comments, the ex parte communication shall be disclosed as required by section 10283. This subsection, and the other provisions of section 10288, apply only in limited circumstances where the Commission does not act on an adjudicatory matter at the same meeting at which it holds a public hearing, including where the Commission extends the time period for submitting written comments on a pending matter. Subsection 10288(a) would be amended to clarify that it applies to any ex parte communication, whether oral or in writing, that occurs after the public hearing is closed or the deadline for submitting written comments "but before the Commission has voted on the matter that is the subject of the communication." In addition, this subsection would be amended to clarify that following disclosure of the communication as required by section 10283, notice of the communication shall be provided as required by Section 10286.

In addition, the Authority and Reference note would be amended to add references to Government Code section 66641.6 and Public Resources Code sections 29610-29611. Government Code section 66641.6 authorizes the Commission, after hearing, to issue an enforcement order setting administrative civil liability and Public Resources Code sections 29610-29611 are the penalty provisions of the SMPA. Commission enforcement proceedings that may result in the imposition of administrative civil liability are adjudicatory proceedings subject to the Commission's regulations on ex parte communications.

**Section 10315 -- Submittal of Design Review Board Materials**

This section lists the materials required to be submitted by an applicant for a project that requires review by the DRB. The list of materials required to be submitted by this regulation is both extensive and detailed, and in practice, BCDC staff does not refer applicants for a project

that requires DRB review to this regulation or require the submission of all materials listed in this regulation prior to DRB review of a project. For these reasons, this section would be amended to: (1) delete the existing lengthy list of materials required by this regulation; and (2) instead require submission of required documents as identified or described in the Commission pamphlet entitled “BCDC’s Design Review Board: What It Is, How it Works” (or any successor pamphlet) or all documents requested in writing by or on behalf of the Executive Director as necessary for DRB evaluation of the proposed project. In addition, because DRB review may be conducted before an application for a BCDC permit is submitted, this section would be amended to refer to the documents to be submitted by an applicant “or prospective applicant” for a permit.

In addition, the Authority and Reference note would be amended to: (1) add references to Government Code section 66632(b) and Public Resources Code section 29520(a); (2) delete the page citations to San Francisco Bay Plan Public Access Finding b and Policy 9; and (3) add a reference to San Francisco Bay Plan Public Access Policy 12. Government Code section 66632(b) authorizes the Commission to establish reasonable requirements to assure that permit applicants provide sufficient information to allow the Commission to act on an application; Public Resources Code section 29520(a) provides that, except as expressly provided in the SMPA, the Commission shall use the procedures set forth in the MPA for the submission, review, and issuance of permits under the SMPA. The page citations to San Francisco Bay Plan Public Access Finding b and Policy 9 are no longer correct because the Bay Plan has been amended since this regulation was last amended in 1998. It is sufficient to reference Finding b and Policy 9 without page citations because the current page citations, if added, would soon become outdated and incorrect as the result of future Bay Plan amendments. San Francisco Bay Plan Public Access Policy 12 is added as a reference because it provides that the DRB should advise the Commission regarding the adequacy of public access proposal.

### **Section 10316 -- Submittal of Engineering Criteria Review Board Materials**

This section lists the materials required to be submitted by an applicant for a project that requires review by the ECRB and would be amended in a number of respects. First, this section would be amended to clarify that the submission shall include the following basis of engineering design criteria needed to accommodate ECRB review: all geotechnical reports and geologic findings, structural plans, engineering analyses including any coastal engineering analysis, design calculations, if required to support analyses, and architectural renderings of the proposed project. Second, to allow adequate time for ECRB review, this section would be amended to increase the time for submittal of such materials from at least 14 days to at least 30 prior to the scheduled meeting at which the ECRB will review the project. Third, the existing requirement to submit 13 copies of required materials would be deleted. Since materials are now typically submitted in electronic format, submission of multiple copies, one for each ECRB member, is no longer necessary. Finally, because ECRB review may be conducted before an application for a BCDC permit is submitted, this section would be amended to refer to the materials to be submitted by an applicant “or prospective applicant” for a permit.

In addition, the Authority and Reference note would be amended to: (1) add references to Government Code sections 66605(e) and 66632(b) and Public Resources Code section 29520(a); (2) delete the page citations to San Francisco Bay Plan Safety of Fills Findings a, b and c and Policies 1 and 2. Government Code section 66605(e) requires that fill in the Bay or certain waterways “be constructed in accordance with sound safety standards.” Government Code section 66632(b) authorizes the Commission to establish reasonable requirements to assure that permit applicants provide sufficient information to allow the Commission to act on an application; Public Resources Code section 29520(a) provides that, except as expressly provided in the SMPA, the Commission shall use the procedures set forth in the MPA for the submission, review, and issuance of permits under the SMPA. The page citations to San Francisco Bay Plan Safety of Fills Findings and Policies are no longer correct because the Bay Plan has been amended since this regulation was adopted in 1990. It is sufficient to reference these Findings and Policies without page citations because the current page citations, if added, would soon become outdated and incorrect as the result of future Bay Plan amendments.

#### **Section 10360 -- Distribution of Applications**

This section requires the Executive Director to distribute one copy of an application for a major permit and associated “drawings” to six listed government agencies and the Deputy Attorney General assigned to the Commission. This section is intended to provide notice to the listed agencies regarding a project that is the subject of a BCDC permit application, but is not intended to require Commission staff to provide to other agencies comprehensive information about a proposed project and copies all associated documentation submitted to the Commission in the BCDC permit application process. For this reason, this section would be amended to clarify that the Executive Director is required to distribute to the listed agencies only copies of the fully completed and properly executed permit application form, any attachments or exhibits that provide a complete project description, and the project site plan, but not any and all attachments, exhibits or other supporting documents submitted with an application.

This section would also be amended to delete the requirement that the Executive Director provide these application materials to the Deputy Attorney assigned to the Commission because the Deputy Attorney General is not typically involved in reviewing and advising Commission staff regarding permit applications. The Deputy Attorney assigned to the Commission would continue to receive copies of the application summary and staff recommendation on a major permit application in accordance with sections 10381(a) and 10504 of the regulations, respectively.

Finally, this section would be amended to require the Executive Director to distribute copies of the application materials to the listed agencies not less than 28 days prior to the Commission hearing on the application because, under section 10400 of the regulations, this is generally the minimum time period following receipt of an application before the Commission may hold a public hearing on the application.

### **Section 10370 -- Non-Material Amendments to Pending Major Permit Applications**

Subsection 10371(b) requires that an applicant for a major permit submit a letter requesting a non-material amendment to a pending permit application. The Commission proposes to amend subsection 10370(b) to add a sentence stating that when there are two or more co-applicants for a major permit, each co-applicant (or co-applicant's representative) shall sign the letter requesting an amendment to the application. When there are two or more co-applicants for a major permit, the Commission's regulations currently require each co-applicant to sign the application form and certify the accuracy of the information provided. 14 C.C.R. § 10310(a) and Title 14 of the California Code of Regulations, Div. 5, appendix D, Box 1. The proposed amendment to subsection 10370(b) would clarify that the existing requirement for co-applicants to jointly sign an application for a major permit also applies to any request to amend a pending application for such a permit. Because co-permittees generally are jointly responsible for meeting all permit obligations, the Commission requires confirmation, by the signatures of all co-applicants, that each co-applicant has knowledge of and concurs in any request to amend a pending permit application.

### **Section 10371 -- Material Amendments to Pending Major Permit Applications**

Subsection 10371(b) describes the information that must be included in any request for a material amendment to a pending major permit application. The Commission proposes to amend section 10371(b) to provide that a request for a material amendment to a pending application shall be submitted by letter and that if there are two or more co-applicants, each co-applicant (or co-applicant representative) shall sign the letter requesting the amendment. When there are two or more co-applicants for a major permit, the Commission's regulations currently require each co-applicant to sign the application form and certify the accuracy of the information provided. 14 C.C.R. § 10310(a) and Title 14 of the California Code of Regulations, Div. 5, appendix D, Box 1. The proposed amendment to section 10371(b) would clarify that the existing requirement for co-applicants to jointly sign an application for a major permit also applies to any request to amend a pending application for such a permit. Because co-permittees generally are jointly responsible for meeting all permit obligations, the Commission requires confirmation, by the signatures of all co-applicants, that each co-applicant has knowledge of and concurs in any request to amend a pending permit application.

### **Section 10501 -- Contents of Resolution of Approval**

Section 10501 addresses the required contents of a resolution of approval of a major permit application, which typically are set forth in the staff recommendation on an application. Section 10501 would be amended in a number of respects.

First, as current written, subsections 10501(d)(1)(B) and 10501(d)(1)(C) impose different findings requirements when the Commission acts on an application for a marsh development permit under the SMPA depending on whether or not Solano County has adopted, and the

Commission has certified, a Local Protection Program (“LPP”) for the Suisun Marsh. However, Solano County has in fact adopted and the Commission has certified the Suisun Marsh LPP under the SMPA. Accordingly, subsection 10501(d)(1)(B), which is premised on the assumption that there is no certified LPP, would be deleted and existing section 10501(d)(1)(C) would be redesignated as section 10501(d)(1)(B).

Second, former subsection 10501(d)(1)(C) (redesignated as section 10501(d)(1)(B)) would be amended to delete superfluous language referring to “if a certified local protection program exists” because, as discussed above, Solano County has adopted and the Commission has certified the Suisun Marsh LPP.

Third, subsection 10501(d)(3), which addresses the findings the Commission is to make when acting as a responsible agency under the CEQA, would be amended to clarify that: (1) the CEQA lead agency determines whether a project is statutorily or categorically exempt and prepares the CEQA environmental review document on which the Commission relies; (2) that negative declarations are adopted, not certified; and (3) that if the lead agency prepares and certifies an environmental impact report, the Commission’s resolution of approval will include the rationale for any Commission findings made pursuant to sections 15091(a) and 15093(b) of the CEQA Guidelines (14 C.C.R. §§ 15091(a) and 15093(b).) The changes are proposed to make subsection 10501(d)(3) consistent with the CEQA Guidelines.

Fourth, subsection 10501(d)(4), which addresses the findings the Commission is to make when acting as the CEQA lead agency, would be amended to clarify that: (1) the Executive Director determines whether a project is statutorily or categorically exempt or will not have any significant adverse effect on the environment and the Commission prepares an environmental assessment that complies with the Commission’s regulations governing preparation of such a document; and (2) if the Commission prepares an environmental assessment, the resolution of approval will include the basis for any Commission findings made pursuant to Public Resources Code section 21081 and sections 15091(a) and 15093(b) of the CEQA Guidelines (14 C.C.R. §§ 15091(a) and 15093(b).) Finally, this section would be amended to delete the ambiguous existing language referring to “the terms and conditions of the Commission permit together with the actions of other agencies [making] the project consistent with [CEQA].” CEQA establishes certain procedural and substantive requirements that must be met in the environmental review and project approval process, but it is not appropriate or correct to refer to a project as being consistent with CEQA. These changes will make subsection 10501(d)(4) conform to the Commission’s regulations governing implementation of CEQA (Title 14 of the California Code of Regulations, Div. 5, ch. 15), particularly sections 11500, 11501, 11511, and 11521), as well as with the CEQA Guidelines.

In addition, the Authority and Reference note would be amended to add a reference to Public Resources Code section 29501(a), which authorizes the Commission to issue permits for any development with the primary management area of the Suisun Marsh.

### **Section 10504 -- Staff Recommendation—Presentation**

This section provides that the Executive Director should mail a staff recommendation on an application to the Commission, the applicant, and each interested party at least six days prior to the Commission meeting at which the matter is noticed for consideration. The Commission proposes to amend Section 10504 to provide that the Executive Director may provide the staff recommendation by electronic mail or first class mail and should also make the staff recommendation available on the Commission's website at least six days prior to the Commission meeting at which the application will be considered. The first sentence of section 10504 would also be amended to delete the reference to providing the staff recommendation "in writing," because it is clear from the context that a staff recommendation provided by email or first class mail and posted on the website will be in writing. The proposed changes reflect current practice in that, with the consent of the party to receive Commission materials, including staff recommendations, electronically, the Commission has for a number of years provided such meeting materials by email and has also posted these materials on its website prior to each regularly scheduled Commission meeting.

In addition, the Authority and Reference note would be amended to add a reference to Public Resources Code section 29501(a), which authorizes the Commission to issue permits for any development with the primary management area of the Suisun Marsh.

### **Section 10505 -- Applicant's Comments and Commission Questions**

Subsection 10505(b) provides that an applicant may request postponement of a matter if the Executive Director has not mailed the staff recommendation to the applicant at least six days prior to the Commission meeting at which the matter is scheduled for consideration. Consistent with the changes proposed to section 10504, subsection 10505(b) would be amended to state that the Executive may provide the staff recommendation to the applicant at least six days prior to the Commission meeting either by first class mail or by electronic mail.

### **Section 10514 -- Commission Findings on Permits**

This section addresses the Commission's findings on permits. Subsection 10514(a) applies when the Commission vote is consistent with the Executive Director's recommendation. Subsection 10514(b) applies when the Commission approves an application with additional or different terms or conditions than those recommended by the Executive Director. Subsections 10514(c) and (d) apply when the Commission vote is not consistent with the Executive Director's recommendation. Subsection 10514(e) addresses the Executive Director's preparation of draft findings when the Commission has voted on a permit application in a manner that is not consistent with the Executive Director's recommendation.

Subsections 10514(b), (c), and (d) would each be amended to provide that: (1) any Commissioners who votes in a manner different than recommended by the Executive Director

“may,” rather than “shall,” state their reasons for doing so after the vote becomes final; and (2) any such Commissioner who fails to state the reasons for his or her vote shall be presumed to have based his or her vote on the testimony or other evidence in the record that supports the Commission’s action. The Commission typically votes in a manner consistent with the Executive Director’s recommendation. For example, the most recent occasion in which the Commission voted to deny an application for which the Executive Director recommended approval was in February 2017. The Commission vote on that matter highlighted the impracticability of subsections 10514(b), (c), and (d) as currently written, which each require all Commissioners to state their reasons for voting for additional or different conditions or contrary to the Executive Director’s recommendation after the vote becomes final.

This existing requirement is impractical because: (1) Commissioners discuss an application, including questions, concerns, and comments before a vote, not after; (2) not all Commissioners indicate how they intend to vote or the reasons for their vote; (3) until the vote is taken, it is not known whether the Commission has voted in a manner consistent or inconsistent with the Executive Director’s recommendation; (4) until the vote is taken, it is not known which Commissioners voted in a manner inconsistent with the Executive Director’s recommendation; and (5) after it votes on an application the Commission promptly moves to the next agenda item rather than providing for each Commissioner who voted in a manner inconsistent with the Executive Director’s recommendation to state his or her reason for doing so. For all of these reasons, subsections 10514(b), (c), and (d) would each be amended to: (1) provide that each Commissioner who voted in a manner inconsistent with the Executive Director’s recommendation may, but is not required, to state his or her reasons for doing so; and (2) provide that any Commissioner who fails to state the reasons for his or her vote shall be presumed to have based his or her vote on the testimony or other evidence in the record that supports the Commission’s action.

In addition, subsection 10514(e), which addresses the Executive Director’s preparation of draft findings when the Commission has voted in a manner that is not consistent with the Executive Director’s recommendation, would be amended to provide clarity and consistency with the amended language of subsections 10514(b), (c), and (d), by substituting the phrase “testimony or other evidence in the record” for “materials” in describing the information that the Executive Director may consider in preparing such findings.

Finally, the Authority and Reference note would be amended to add a reference to Public Resources Code section 29501(a), which authorizes the Commission to issue permits for any development with the primary management area of the Suisun Marsh.

#### **Section 10521 -- Mailing to Permittee(s)**

Subsection 10521(a) requires the Executive Director to sign and mail a permit to all permittees within 15 working days following approval of the permit. This subsection would be amended to delete the existing text which further provides that if the permit authorizes the disposal of any

dredged material into an area of the Commission's "Bay" or "certain waterways" jurisdiction, the applicant must also submit a user fee as provided for in section 10522 before the Executive Director shall sign and mail the permit. The Commission was previously authorized by statute to impose a user fee upon any public agency or person who proposed to dispose of dredged material in specified areas, not to exceed a total amount of such fees of \$210,000, to be used by the Commission to implement the Long Term Management Strategy for the disposal of dredge material. The statutory authorization for that fee expired on January 1, 1999, and the Commission has not imposed such a user fee since that time. 1995 Cal. Stats. Ch. 951 (1995). Therefore, the portion of this regulation requiring submission of such a user fee in certain circumstances should be deleted as no longer authorized, necessary, or appropriate.

#### **Section 10522 -- User Fee for Disposal of Dredged Material into Commission's "Bay" or "Certain Waterways" Jurisdictions**

This section governed the submission of a user fee for the disposal of dredged material into the Commission's "Bay" or "certain waterways" jurisdiction. As noted above, the Commission was previously authorized by statute to impose a user fee upon any public agency or person who proposed to dispose of dredged material in specified areas, not to exceed a total amount of such fees of \$210,000, to be used by the Commission to implement the Long Term Management Strategy for the disposal of dredge material. The statutory authorization for that fee expired on January 1, 1999, and the Commission has not imposed such a user fee since that time. 1995 Cal. Stats. Ch. 951 (1995). Therefore, this regulation requiring submission of such a user fee in certain circumstances should be deleted as no longer authorized, necessary, or appropriate.

#### **Section 10601 -- Minor Repairs or Improvements**

Section 10601 describes the categories of activities within the different areas of the Commission's jurisdiction that constitute "minor repairs or improvements" that the Executive Director may authorize by an administrative permit after the application for such a permit is listed for the Commission's consideration. This section would be amended in a number of respects to provide greater specificity and clarity regarding the activities that the Executive Director may authorize by an administrative permit.

Subsection 10601(a) currently applies to certain activities within the Commission's "Bay" jurisdiction and would be amended to also encompass those same activities within the Commission's "certain waterways" jurisdiction. The omission of any reference to activities within the Commission's "certain waterways" jurisdiction in any of the subsections of section 10601 appears to be an oversight and has required staff to consider activities within the Commission's "certain waterways" jurisdiction under the general provision of subsection 10601(e), which applies to "activities anywhere in the Commission's jurisdiction." It is appropriate for subsection (a) to apply to specified activities in both the Commission's "Bay" and "certain waterways" jurisdictions because both jurisdictional areas are similarly defined in

Government Code section 66610 as being subject to tidal action and as including submerged lands, tidelands, and marshlands up to five feet above mean sea level.

Subsection 10601(a)(1) allows construction of a new single boat dock no larger than 1,000 square feet to be authorized by an administrative permit. This square footage limitation has been exceeded in some cases, particularly when associated facilities such as boat lifts and gangways are taken into account, that has led to uncertainty whether a somewhat larger single dock may be authorized administratively or would require consideration by the Commission as a major permit application. Therefore, it is proposed to increase the allowable square footage for a single dock to 1,500 square feet and to clarify that this limit includes associated docking facilities such as lifts, gangways, and pilings. This subsection would also be amended to clarify that the 5,000 square foot limitation for a new multiple dock includes associated facilities.

Subsection 10601(a)(2) allows the installation of new shoreline protective works and repairs to existing protective works, such as bulkhead and riprap, that meet specified criteria to be authorized by an administrative permit. This subsection would be amended to specifically reference levees and natural or nature-based features as protective works that may be authorized administratively. In addition, in the phrase “repairs to existing protective works,” the word “existing” would be deleted as unnecessary.

Subsection 10601(a)(2)(A) would be amended to add the words “of fill” after the words “minimum amount” to clarify that the criterion is that the size of the protective works would constitute the minimum amount of fill necessary. Subsection 10601(a)(2)(B) would be amended to replace the existing vague reference to 10,000 square feet of coverage “of the horizontal projection of the work below the shoreline,” with a clearer and more direct reference to coverage “of the Bay or a certain waterway.”

Subsection 10601(a)(5), which refers to the placement of utility cables on or under the bottom of the Bay, would be amended to: (1) include the placement of pipelines; and (2) add a reference to on or under the bottom “of a certain waterway.”

Subsection 10601(a)(6), which refers to “routine repairs, reconstruction, replacement, removal, *and* maintenance, would be amended to change the conjunction “and” to “or” and to clarify that each these activities would be conducted in relation to “a structure.”

Subsection 10601(a)(8) allows minor fill for improving public access that does not exceed 1,000 square feet in area to be authorized by an administrative permit. The 1,000 square foot limitation may result in unnecessary Commission review of relatively small beneficial projects involving minor fill for public access. Therefore, it is proposed to amend this section to increase to 5,000 square feet the area of minor fill for improving public access that may be authorized administratively.

New subsection 10601(a)(9) would be added to allow minor fill for habitat restoration that would cover less than 10,000 square feet of the Bay or a certain waterway to be authorized by

an administrative permit. This amendment is consistent with the Commission's recently adopted Bay Plan policies regarding fill for habitat. In addition, the 10,000 square foot limitation is consistent with the same area limitation for new shoreline protective works and repairs to existing protective works under subsection 10601(a)(2)(B).

New subsection 10601(a)(10) would be added to allow the extraction or dredging of no more than 10,000 cubic yards of materials to enhance tidal connectivity or restore habitat or the disposal of such materials within an existing site for such purposes to be authorized by an administrative permit. As with new subsection (a)(9), this amendment is consistent with the Commission's recently adopted Bay Plan policies regarding fill for habitat.

Subsection 10601(b) applies to certain activities within the Commission's 100-foot shoreline band jurisdiction. More specifically, subsection 10601(b)(1) allows the placement of small amounts of fill, the extraction of small amounts of materials, or a substantial change of use of any area so long as such activities do not have a significant adverse effect on, among other things, public access. This subsection would be amended for clarity to refer to existing or possible future public access and delete as potentially confusing the existing reference to maximum feasible public access to the Bay consistent with the project. This subsection would also be amended to replace the existing vague and incorrect reference to a designated "priority water-related use," with the term designated "water-oriented priority land use," consistent with the terminology used in Government Code section 66611. Finally, this subsection would be amended to change the conjunction "and" at the end of the sentence to "or" to clarify that a significant adverse effect as to any of the three described considerations would preclude authorization by an administrative permit.

Subsection 10601(b)(4) allows the installation of new shoreline protective works and repairs to existing protective works, such as bulkhead and riprap, that meet specified criteria to be authorized by an administrative permit. Consistent with the proposed amendments to subsection 10601(a)(2) discussed above, this subsection would be amended to specifically reference levees and natural or nature-based features as protective works that may be authorized administratively. In addition, in the phrase "repairs to existing protective works," the word "existing" would be deleted as unnecessary.

Consistent with the proposed amendments to subsection 10601(a)(6) discussed above, subsection 10601(b)(5), which also refers to "routine repairs, reconstruction, replacement, removal, *and* maintenance, would be amended to change the conjunction "and" to "or" and to clarify that each these activities would be conducted in relation to "a structure."

Subsection 10601(c) applies to certain activities within the Commission's salt ponds and managed wetlands jurisdictions. More specifically, subsection 10601(c)(1) allows the reconstruction of existing power transmission towers, communication towers, and walkways providing access to such towers to be authorized by an administrative permit. In this subsection, the word "existing" would be deleted as unnecessary.

Subsection 10601(c)(2) allows certain repairs to protective works as necessary to stabilize existing dikes or provide improved wildlife habitat to be authorized by an administrative permit. To be consistent with amended subsections 10601(a)(2) and 10601(b)(4), discussed above, this subsection would be amended to: (1) apply to both the installation of new shoreline protective works and repairs to existing protective works; (2) refer to protective works such as bulkheads, levees, natural or nature-based features, and riprap; and (3) add the words “of fill” after the words “minimum amount” to clarify that the criterion is that the protective works would constitute the minimum amount of fill necessary.

New subsection 10601(c)(3) would be added to allow minor fill for habitat restoration that would cover less than 10,000 square feet of a salt pond or managed wetlands to be authorized by an administrative permit. This amendment would be consistent with the Commission’s recently adopted Bay Plan policies regarding fill for habitat and with new subsection 10601(a)(9), discussed above.

New subsection 10601(c)(4) would be added to allow the extraction or dredging of no more than 10,000 cubic yards of materials to enhance tidal connectivity or restore habitat or the disposal of such materials within an existing site for such purposes to be authorized by an administrative permit. This amendment would be consistent with the Commission’s recently adopted Bay Plan policies regarding fill for habitat and with new subsection 10601(a)(10), discussed above.

Finally, the Authority and Reference note would be amended to: (1) delete the reference to Public Resources Code section 29201(e); and (2) add a reference to Public Resources Code section 29501(a). Public Resources Code section 29201(e) authorizes the Commission to adopt regulations consistent with the SMPA and is properly cited as authority for this regulation. Public Resources Code section 29501(a) authorizes the Commission to issue permits for any development with the primary management area of the Suisun Marsh and should be added as a reference.

### **Section 10610 -- Application**

Section 10610 describes the materials to be submitted by an applicant for an administrative permit. This section would be amended to add a new subsection 10610(f) to clarify that the provisions of Commission regulation section 10311, which authorizes the Executive Director to waive or modify certain permit application filing requirements for a major permit application and also specifies those application requirements that the Executive Director may not modify, apply to applications for an administrative permit. The Executive Director’s discretion to waive or modify certain application filing requirements, and the identified requirements that may not be waived or modified, as specified in section 10311, should also apply to an administrative permit application. Moreover, this proposed amendment would reflect current practice under which the Executive Director has waived or modified certain filing requirements for administrative permits when necessary or appropriate to do so.

### **Section 10612 -- Amendment to Administrative Permit Applications**

This section requires an applicant who wants to amend an application for an administrative permit to submit an amendment request by letter. The Commission proposes to amend subsection 10612(b) to add a sentence stating that when there are two or more co-applicants, each co-applicant (or co-applicant's representative) shall sign the letter requesting an amendment to the application. As noted above, when there are two or more co-applicants for a major permit, the Commission's regulations currently require each co-applicant to sign the application form and certify the accuracy of the information provided. 14 C.C.R. § 10310(a) and Title 14 of the California Code of Regulations, Div. 5, appendix D, Box 1. The proposed amendment to subsection 10612(b) would clarify that the existing requirement for co-applicants to jointly sign a major permit application also applies to any request to amend an application for an administrative permit. Because co-permittees generally are jointly responsible for meeting all permit obligations, the Commission requires confirmation, by the signatures of all co-applicants, that each co-applicant has knowledge of and concurs in any request to amend a pending permit application.

### **Section 10620 -- Administrative Listing**

Section 10620 addresses the administrative listing process followed by the Executive Director prior to acting on an application for an administrative permit. Subsection 10620(a) requires the Executive Director to submit a list of the applications that are ready to be acted on to the Commission, any persons who requested receipt of the list, and all agencies that have jurisdiction with respect to the proposed activity that is the subject of the matter listed. Subsection 10620(a) would be amended to also require submission of the list of applications to each applicant whose application is listed. This proposed amendment reflects the Executive Director's current practice of providing notice to each applicant whose application is listed of the administrative listing of his, her, or its application.

Subsection 10620(b) currently provides that a listing will be mailed to the Commission and other parties identified in subsection 10620(a) at least five days prior to a regularly scheduled Commission meeting date. The Commission proposes to amend section 10620(b) to allow a listing to be sent by mail or electronic mail and to also state that a listing will be posted on the Commission's website. These changes will allow the Executive Director to take advantage of currently available more time-efficient and less costly methods of providing an administrative listing. The proposed changes reflect current practice in that the Executive Director has for a number of years provided administrative listings by email and has also posted such listings on its website prior to each regularly scheduled Commission meeting.

### **Section 10621 -- Executive Director's and Commission's Action After Listing**

Section 10621 addresses the Executive Director's and Commission's action on an application for an administrative permit after an administrative listing. Section 10621 would be amended in

three respects. First, subsection 10621(b) would be amended to correct a typographic error by changing the word “with” to “within” toward the end of the sentence. As revised the sentence would end: “...time period within which the McAteer-Petris Act requires action on a permit application.”

Second, as presently written, subsection 10621(d) requires the Executive Director to act on an application for an administrative permit within five working days after it is determined that the Commission will not consider the application. The five-working-day deadline for issuance of an administrative permit provides a disincentive for staff to list an application for an administrative permit early because after listing staff must finalize and issue the permit promptly, even if doing so conflicts with other more pressing work priorities. In addition, the five-working-day deadline may be inconsistent (and considerably shorter than) the 90-day period provided for the Commission to act on a permit application under Government Code section 66632(f). For these reasons, subsection 10621(d) would be amended to enlarge the time period by which the Executive Director must act on an administrative permit to the 90-day period provided by Government Code section 66632(f).

Third, section 10421 of the regulations allows for the withdrawal of an application for a major permit or the removal of such an application from active consideration by the Commission. The regulations governing administrative permits currently do not address these issues. Therefore, a new subsection 10621(e) would be added to allow for the withdraw of an application for an administrative permit or the removal of such an application from active consideration by the Commission. In addition, subsection 10621(e) would state that the provisions of section 10421 shall apply to the permanent withdrawal or temporary removal from active consideration of an application for an administrative permit.

Finally, the Authority and Reference note would be amended to add a reference to Public Resources Code section 29501(a), which authorizes the Commission to issue permits for any development with the primary management area of the Suisun Marsh.

### **Section 10652 -- Criteria for Granting Permit**

This section provides the criteria for issuing an emergency permit. Given the emergency situation necessitating the need for an emergency permit, such a permit is issued based on an expedited review of the limited materials concerning the nature of the emergency, the proposed work, and any associated mitigation measures that are available at the time the emergency permit is requested, and potentially without such a permit including what might be necessary or appropriate terms and conditions. For these reasons, this section would be amended to state that the reasonable terms and conditions of an emergency permit may include an expiration date and a requirement to submit a regular permit application by a specified date. This change will allow for Commission consideration of a regular permit application under normal permitting timeframes, as well as the inclusion of all necessary or

appropriate permit terms and conditions, where the work authorized by an emergency permit will remain in place indefinitely and it is determined should be authorized by a regular permit.

### **Section 10653 -- Documentation Subsequent to Issuance of an Emergency Permit**

This section addresses the documentation to be submitted by a permittee following issuance of an emergency permit. Currently this section requires submission of descriptive material concerning the emergency work “that is substantially similar to the documentation required in applications for administrative permits.” This language is vague and does not provide clear direction to permittees or staff as to exactly what materials a permittee is required to submit following issuance of an emergency permit. This section would be amended to clarify that a permittee shall submit the descriptive material concerning the emergency work specifically “requested by the Executive Director when issuing the emergency permit.” In addition, at the end of this section, the word “work” would be deleted and replaced with the words “emergency permit” to clarify that appropriate fees are determined and due for the emergency permit, not for the work.

### **Section 10700 -- Minor Fills for Improving Shoreline Appearance**

This section allows the Commission to approve the placement of minor fill to improve shoreline appearance, including but not limited to the repair, maintenance, renovation, remodeling, rehabilitation, or replacement of a pre-existing residential structure, only if the Commission makes the findings required by this section, in addition to the other findings required by Government Code section 66605 and the San Francisco Bay Plan. Two of the findings required by this section are that the amount of filling is the minimum necessary to improve shoreline appearance (subsection 10700(b)) and the project would improve the shoreline appearance (subsection 10700(c)). Furthermore, subsection 10700(e) provides that with regard to a pre-existing residential structure, the requirements of subsections (b) and (c) will be deemed met if four specified conditions apply.

Subsection 10700(e) would be amended in two respects. First, four subdivision designations (*i.e.*, (i), (ii), (iii), and (iv)) would be inserted to clearly identify the four applicable conditions. Second, the third condition would be amended to change “will cover less of” to “will cover no more of” the Bay surface than the pre-existing structure. As amended, subsection 10700(e) would read:

(e) with regard to a pre-existing residential structure, the requirements of subdivisions (b) and (c) above will be deemed met if (i) the repair, maintenance, rehabilitation, renovation, remodeling or replacement will not substantially enlarge the size of the pre-existing structure, (ii) will not be out of character or scale with any nearby structures, (iii) will cover ~~less~~ no more of the Bay surface than the pre-existing structure, and (iv) will not change the use of the pre-existing structure.

Amending the third condition in this subsection by changing “will cover less of” to “will cover no more of” the Bay surface than the pre-existing structure represents a significant change from past and current Commission policy. The existing regulation currently requires a rehabilitated, renovated, remodeled or replaced residential structure to cover less of the Bay surface than the pre-existing structure (*i.e.*, to be reduced in size over the Bay) in recognition of that fact that residential use of the Bay is a nonconforming use inconsistent with both the water-oriented use test under Government Code section 66605(a) and the Public Trust Doctrine. In contrast, the proposed amendment would allow a rehabilitated, renovated, remodeled, or replaced residential structure to continue to cover the same area of Bay surface (*i.e.*, to not be reduced in size over the Bay) and would reflect that although a pre-existing residential structure is a nonconforming use, such a non-conforming use will be allowed to continue to occupy its existing footprint over the Bay indefinitely.

In addition, the Authority and Reference note would be amended to add a reference to Public Resources Code section 29501(a), which authorizes the Commission to issue permits for any development with the primary management area of the Suisun Marsh.

#### **Section 10702 -- Using the Bay as a Design Asset**

This section allows the Commission to approve the extension of an accessory structure, such as a boat dock, and portions of a principal structure on pilings over water when the Commission makes the findings required by this section, in addition to the other findings required by Government Code section 66605 and the San Francisco Bay Plan, including those that require Bay fill to be either for a water-oriented use, minor fill to improve shoreline appearance, or minor fill to improve public access. Among other factors, this section requires the Commission to find either that: (1) the extension is necessary to allow actual use of the water (*i.e.*, for mooring boats); or (2) the extension is designed by means such as location, window placement, and size to afford to occupants of the structure a feeling of closeness to the surface of the Bay waters that cannot be achieved except by the extension of portions of structures over water on piles.

Section 10702 was adopted in 1987 to implement San Francisco Bay Plan “Other Uses of the Bay and Shoreline” Policy 2, which provides:

Accessory structures such as boat docks and portions of a principal structure may extend on piles over water when such extension is necessary to enable actual use of the water, e.g., for mooring boats or “*to use the Bay as an asset in the design of the structure.*” (emphasis added).

For the following reasons, it is proposed to repeal this regulation. First, to the extent this section allows the extension of an accessory structure over water as necessary to allow the actual use of the water, such as for mooring boats, this regulation is unnecessary; such an extension may be authorized for this purpose as a water-oriented use and also, in appropriate

circumstances, under section 10700 of the regulations as minor fill to improve shoreline appearance. Second, to the extent this section allows the extension of an accessory or principal structure on the grounds that the extension is designed to afford to occupants of the structure a feeling of closeness to the surface of the Bay waters that cannot be achieved except by the extension of portions of the structures over water on piles, there is no statutory authority for regulating the Bay as a “design asset” under the McAteer-Petris Act. Third, if the accessory or principal structure is used for a non-water-oriented use (such as residential, general office, or storage), the extension could not be authorized under this regulation, which also requires: (1) findings under the fill tests established by Government Code 66605; and (2) that the extension would not be inconsistent with the public trust. Finally, and as a related matter, this regulation appears to be unnecessary given that, to the best of the knowledge of current BCDC staff, this regulation has never been relied upon by the Commission to approve an extension of an accessory or principal structure on pilings over the Bay as a design asset.

#### **Section 10810 -- Applications for and Action on Nonmaterial Amendments to an Administrative Permit**

Subsection 10810(a) provides that an application for a nonmaterial amendment to an administrative permit shall be made by letter. The Commission proposes to amend subsection 10810(a) to add a sentence stating that when there are two or more co-permittees, each co-permittee shall sign the letter requesting an amendment to the permit. As discussed above, when there are two or more co-applicants for a major permit, the Commission’s regulations currently require each co-applicant to sign the application form and certify the accuracy of the information provided. 14 C.C.R. § 10310(a) and Title 14 of the California Code of Regulations, Div. 5, appendix D, Box 1. The proposed amendment to section 10810(a) would clarify that the existing requirement for co-applicants to jointly sign a permit application also applies to any request to amend an administrative permit. Because co-permittees generally are jointly responsible for meeting all permit obligations, the Commission requires confirmation, by the signatures of all co-permittees, that each co-permittee has knowledge of and concurs in any request to amend a permit.

#### **Section 10820 -- Applications for Nonmaterial Amendments to Major Permits**

Subsection 10820(a) provides that an application for a nonmaterial amendment to a major permit shall be made by letter. For the same reasons discussed above for subsection 10810(a), the Commission proposes to amend subsection 10820(a) to add a sentence stating that when there are two or more co-permittees, each co-permittee shall sign the letter requesting an amendment to the permit. As discussed above, when there are two or more co-applicants for a major permit, the Commission’s regulations currently require each co-applicant to sign the application form and certify the accuracy of the information provided. 14 C.C.R. § 10310(a) and Title 14 of the California Code of Regulations, Div. 5, appendix D, Box 1. The proposed amendment to subsection 10820(a) would clarify that the existing requirement for co-applicants to jointly sign a permit application also applies to any request to amend a major

permit. Because co-permittees generally are jointly responsible for meeting all permit obligations, the Commission requires confirmation, by the signatures of all co-permittees, that each co-permittee has knowledge of and concurs in any request to amend a permit.

### **Section 10830 -- Permit Assignment**

Commission permits typically contain a standard condition developed by staff stating that the rights, duties, and obligations contained in the permit are assignable provided that the permittee/assignor and the assignee execute and submit to the Commission a permit assignment form acceptable to the Executive Director and the Executive Director approves the assignment. The Commission proposes to add a new section 10830 to authorize permit assignments by regulation and to state the conditions that must be met for an assignment to be effective.

The Authority and Reference note for section 10830 would cite as authority Government Code section 66632(f) and Public Resources Code section 29201(e) and would reference Government Code section 66632(f) and Public Resources Code section 29520(a). Government Code section 66632(f) authorizes the Commission to adopt regulations as it deems reasonable and necessary to enable it to carry out its functions under the MPA, and Public Resources Code section 29201(e) authorizes the Commission to adopt regulations consistent with the SMPA. Government Code section 66632(f) also authorizes the Commission to grant permits under the MPA containing reasonable terms and conditions, and Public Resources Code section 29520(a) provides that, except as expressly provided in the SMPA, the Commission shall use the procedures set forth in the MPA for the submission, review, and issuance of permits under the SMPA.

### **Section 11001 -- Preparation, Contents and Circulation of Draft Adequate Descriptive Notice**

Section 11000 addresses the preparation, content, and circulation of a draft descriptive notice to amend the San Francisco Bay Plan or other specified plans administered by the Commission. The Commission proposes to amend subsection 11000(c) to provide that, at least 10 days prior to the meeting at which the Commission will decide whether to proceed with a proposed amendment, the Executive Director shall mail the draft descriptive notice to all Commissions by first class mail or electronic mail, and shall also make the draft descriptive notice available on the Commission's website. In addition to allowing the descriptive notice to be mailed by email, this proposed amendment will codify the Executive Director's standard practice of posting such notices on the Commission's website.

In addition, the Authority and Reference note would be amended to add an authority citation to Government Code section 66652, which authorizes the Commission to amend all or any portion of the San Francisco Bay Plan (including any special area plans or other plans incorporated by reference into the Bay Plan).

### **Section 11002 -- Commission Determination to Initiate Amendment Process; Adoption and Mailing of Descriptive Notice**

Section 11002 addresses the Commission's determination to initiate an amendment to the San Francisco Bay Plan or certain other plans administered by the Commission. As currently written, subsection 11002(d) requires the Executive Director to mail the approved descriptive notice to, among other parties, each of the six government agencies listed in section 10360. To provide clarity to the cross-reference to section 10360, subsection 11002(d) would be amended to add a parenthetical identifying the six government agencies listed in section 10360.

Subsection 11002(d) would also be amended to provide that, at least 30 days prior to the date of the public hearing on the proposed amendment, the Executive Director shall mail a copy of any approved descriptive notice by first class mail or electronic mail, and shall also make the approved descriptive notice available on the Commission's website.

In addition, the Authority and Reference note would be amended to add an authority citation to Government Code section 66652, which authorizes the Commission to amend all or any portion of the San Francisco Bay Plan (including any special area plans or other plans incorporated by reference into the Bay Plan).

### **Section 11003 -- Staff Planning Report**

Subsection 11003(b) describes the required contents of a staff planning report on a proposed amendment to the San Francisco Bay Plan or certain other plans administered by the Commission. Among other information, subsection 11003(b)(6) requires a staff planning report to contain an environmental assessment. This subsection would be amended to clarify that the environmental assessment on a plan amendment is required to contain the information described in section 11521 (entitled Contents of an Environmental Assessment) of the Commission's regulations.

In addition, as currently written, subsection 11003(b)(7) requires a summary of written comments received following distribution of the descriptive notice but at least 10 days prior to the mailing of the staff planning report and responses to those comments, and subsection 11003(b)(8) requires a summary of and responses to all significant environmental points raised up to the time the staff planning report is mailed. These two subsections are redundant because in practice, a staff planning report includes a summary of and responses to all comments received following distribution of the descriptive notice up to the time the staff planning report is mailed, including but not limited to comments that raise environmental issues and responses thereto. Therefore, it is proposed to: (1) combine these two subsections by amending subsection 11003(b)(7) to encompass the existing requirements of subsection 11003(b)(8); (2) delete existing subsection 11003(b)(8), and (3) renumber existing subsections 11003(b)(9) and 11003(b)(10) accordingly.

### **Section 11005 -- Staff Planning Recommendation**

Subsection 11005(b) describes the required contents of a staff planning recommendation on a proposed amendment to the San Francisco Bay Plan or certain other plans administered by the Commission. As currently written, subsection 11005(b)(1) requires a summary of comments and responses to all comments received either prior to the close of the public comment period or at the public hearing which were not already summarized and responded to in the staff planning report, and subsection 11005(b)(2) requires a summary of and responses to all significant environmental points raised but not summarized and responded to in the staff planning report. These two subsections are redundant because in practice a staff planning recommendation includes a summary of and responses to all comments received following issuance of the staff planning report, including all comments received at the public hearing and prior to the close of the public comment period and including but not limited to comments that raise environmental issues and responses thereto. Therefore, it is proposed to: (1) delete existing subsection 11005(b)(2) as unnecessary and encompassed within subsection 11005(b)(1); and (2) renumber existing subsections 11003(b)(3), 11003(b)(4), 11003(b)(5), and 11003(b)(6) accordingly. In addition, existing subsection 11005(b)(3) – renumbered as subsection 11003(b)(2) – would be amended to clarify that the reference to the Executive Director’s “initial assessment” is to the “initial environmental assessment” prepared pursuant to section 11003(b)(6) of the regulations.

Subsection 11005(c) addresses mailing of the staff planning recommendation. The Commission proposes to amend subsection 11005(c) to provide that the Executive Director shall mail a copy of the staff planning recommendation by first class mail or electronic mail and shall also make the staff planning recommendation available on the Commission’s website.

In addition, the Authority and Reference note would be amended to add authority citations to Government Code sections 66651 and 66652. Government Code sections 66651 provides, in part, that the San Francisco Bay Plan and amendments thereto shall constitute the plan for the Commission to use to establish policies for reviewing and acting on projects. Government Code sections 66652 authorizes the Commission to amend all or any portion of the San Francisco Bay Plan (including any special area plans or other plans incorporated by reference into the Bay Plan).

### **Section 11008 -- Payment of Costs of Processing of an Amendment to a Commission Planning Document**

Section 11008 addresses an applicant’s payment of the costs of processing an amendment to any of the Commission’s planning document. As presently written, subsection 11008(b) requires an applicant, at the time of submitting an amendment application, to submit a cashier’s check for \$5,000 as a deposit toward future costs and to execute an agreement that obligates the applicant to pay all Commission costs of processing and acting on the application. This subsection would be amended to delete as unnecessary the requirement that an applicant

submit a \$5,000 deposit check. This requirement is unnecessary because the applicant will be obligated to pay all costs of processing and acting on the amendment application by the agreement also required by this subsection and because in the Commission's experience, applicants comply with their contractual obligation to pay such costs without the need to submit a deposit check. In addition, this requirement is impractical because in light of the time that is typically required to process and act on an amendment application, a deposit check will often expire before it would be applied toward possible payment of unpaid costs, in accordance with subsection 11008(g) as currently written.

The Commission also proposes to amend subsection 11008(c) to change "quarterly" to monthly," to reflect the Commission's existing practice of preparing and submitting bills for such costs on a monthly basis.

Consistent with the proposed amendments to subsection 11008(c) discussed above, subsection 11008(g) would be amended to delete the references to a \$5,000 deposit paid by the applicant and to the potential application or refunding of some or all of the deposit. As discussed above, payment of a deposit check is unnecessary because applicants are contractually obligated to pay all costs to process and act upon an amendment application. Submission of a deposit check also is impractical because, in light of the time that is typically required to process and act on an application, checks submitted as a deposit often expire before being it would be applied toward payment of unpaid costs.

In addition, the Authority and Reference note would be amended to add authority citations to Government Code sections 66651 and 66652. Government Code sections 66651 provides, in part, that the San Francisco Bay Plan and amendments thereto shall constitute the plan for the Commission to use to establish policies for reviewing and acting on projects. Government Code sections 66652 authorizes the Commission to amend all or any portion of the San Francisco Bay Plan (including any special area plans or other plans incorporated by reference into the Bay Plan).

#### **Section 11020 -- Other Planning Matters**

Section 11020 addresses other planning matters. Section 11020(b) would be amended to provide that if the staff prepares a joint report and recommendation on such a matter, at least 30 days prior to the public hearing on the matter, staff shall mail the joint report and recommendation by first class mail or electronic mail, and shall also make the document available on the Commission's website.

#### **Section 11101 -- Special Area Planning Procedures**

Section 11101 addresses special area planning procedures. The Commission proposes to amend subsections 11101(c) to provide that the Executive Director shall mail any report on a special area planning proposal by first class mail or electronic mail and shall also make the

report available on the Commission's website. Consistent with the proposed amendments to subsection 11101(c), the Commission also proposes to amend subsection 11101(d) to state that the public hearing shall occur no earlier than 10 days after the Executive Director has mailed the report by first class mail or electronic mail and has made the report available on the Commission's website.

In addition, the Authority and Reference note would be amended to: (1) add an authority citation to Government Code section 66651; (2) add a reference to Government Code section 66651; and (3) change the reference to San Francisco Bay Plan from "P. 39, 41," to "Part V, The Plan Maps." Government Code sections 66651 provides, in part, that the San Francisco Bay Plan may contain or incorporate by reference special area plans with more specific findings and policies for portions on the Bay and its shoreline. The existing page references to the San Francisco Bay Plan (*i.e.*, "P. 39, 41") are out of date due to numerous amendments to that document since this regulation was last amended in 1987. Since the current pagination of the Bay Plan will change due to future amendments, rather than cite to a specific page or pages, the reference to the Bay Plan would be amended to refer to "Part V, The Plan Maps," which includes a section entitled "Special Area Plans."

#### **Section 11202 -- Commission Distribution of an Endorsed Local Protection Program or Components Thereof**

Section 11202 addresses Commission distribution of the Suisun Marsh LPP, or a component thereof, prepared and endorsed by Solano County. Subsection 11202(a) would be amended to provide that the Commission shall mail the LPP or component thereof to specified parties by first class mail or electronic mail and shall also make the LPP or component thereof available on the Commission's website.

The Commission also proposes to: (1) add a new subsection 11202(a)(8) requiring distribution of the Suisun Marsh LPP or a component thereof to the Delta Stewardship Council; and (2) renumber existing subsection 11202(a)(8) to 11202(a)(9).

In addition, the Commission proposes to amend subsection 11202(b) to delete as unnecessary the existing requirement that the Commission publish once a week in a newspaper of general circulation for at least two weeks, beginning at least 30 days prior to the public hearing, notice of the availability of the endorsed LPP or a component thereof for public inspection at the Commission's office. Instead, this subsection would be amended to provide that the Commission shall make available on the Commission's website no later than 30 days prior to the public hearing a notice of availability of the endorsed LPP or a component thereof for public inspection both at the Commission's offices and on the Commission's website. Given the prevalence and the ease of public access to information from online sources, including the Commission's website, and given the decline in newspapers of general circulation as a source of public notices, the posting a notice of availability of the endorsed LPP or a component thereof

on the Commission's website will be more effective than providing such notice by publication in a newspaper of general circulation.

### **Section 11203 -- Contents and Distribution of Staff Summary**

Section 11203 address the content and distribution of the staff summary of the Suisun Marsh LLP, a component thereof, or any amendment to the LPP or a component thereof. The Commission proposes to amend subsection 11203(c) to provide that the staff shall mail by first class mail or electronic mail and also make available on the Commission's website the staff summary together with the LPP component or amendment and any associated environmental document.

### **Section 11204 -- Public Hearing(s)**

Section 11204 addresses the public hearing on the Suisun Marsh LPP, a component thereof, or an amendment thereto. The Commission proposes to amend subsection 11204(b) to provide that the Executive Director shall mail the notice of public hearing by first class mail or electronic mail and also make the notice available on the Commission's website.

### **Section 11205 -- Staff Recommendation**

Section 11205 addresses the staff recommendation on the Suisun Marsh LPP, a component thereof, or an amendment thereto. The Commission proposes to delete as unnecessary, inaccurate, and potentially confusing existing subsection 11205(b)(2), which requires a staff recommendation to contain, among other information, "any necessary revisions to the initial environmental assessment." As reflected elsewhere in the Commission's regulations governing certification of the Suisun Marsh LPP, a component thereof, or an amendment thereto, the local government submitting such a document to the Commission for certification will be the CEQA lead agency on that project and, therefore, will prepare an environmental assessment or other CEQA document and also will be responsible for making any necessary revisions to the CEQA document in response to public comments. See 14 C.C.R. §§ 11200(a), (b), and (c). The Executive Director's staff summary will include "a summary of all environmental documentation that the lead agency has prepared." *Id.* § 11203(b)(2). In addition, the Executive Director's staff recommendation will contain responses to all comments received at the public hearing before the Commission, including comments related to potential environmental impacts of the proposed action. *Id.* 11205(b)(1). However, because the Executive Director will not prepare an environmental assessment or revise the environmental documentation prepared by the lead agency, the existing text stating that the staff recommendation will include "any necessary revisions to the initial environmental assessment" should be deleted.

In addition, subsection 11205(c) would be amended to provide that the Executive Director shall mail the staff recommendation by first class mail or electronic mail and also make the staff recommendation available on the Commission's website.

### **Section 11420 -- Contents of Local Marsh Development Authorization**

This section addresses the required contents of a marsh development authorization (*i.e.*, permit) issued by a local government. As currently written, this section imposes different findings requirements depending on whether the Commission has certified the Suisun Marsh LPP. Subsection 11420(c) would be amended to delete as unnecessary the references to findings relating to the project if the Commission has not yet certified the LLP because Solano County has in fact adopted and the Commission has certified the Suisun Marsh LPP. The Commission also proposes to amend this section to refer to the LPP as the “Suisun Marsh Local Protection Program” for consistency with other references to the Suisun Marsh LPP in its regulations. (*See, e.g.*, Title 14, California Code of Regulations, Div. 5, ch. 12 (chapter title refers to the Suisun Marsh LPP); *id.* at ch. 12, article 2 (same); 14 C.C.R. § 11421 (referring to the Suisun Marsh LPP)).

### **Section 11421 -- Finality of Local Marsh Development Authorization**

This section addresses the finality of a local marsh development authorization (*i.e.*, permit). Subsection 11421(a) would be amended to reflect the fact that an appeal can be filed by any aggrieved person as well as by any two members of the Commission (as opposed to by “the Commission,” as incorrectly currently stated in subsection 11421(a)). *See* Pub. Res. Code section 29522 (a). Also, as currently written, this section appears to establish incorrectly two different standards for determining whether an appeal raises a substantial issue, depending on whether the Commission has certified the Suisun Marsh LPP. However Public Resources Code section 29523 provides that in determining whether an appeal raises a substantial issue the Commission is to consider the conformity of a proposed development with the provisions of the Suisun Marsh Preservation Act, the Suisun Marsh LPP (if in existence), and the policies of the Suisun Marsh Protection Plan. Therefore, section 11421 would be amended to track the language of Public Resources Code section 29523 regarding determining whether an appeal raises a substantial issue while also deleting the existing text referring to “if no certified Suisun Marsh [LPP] exists” because, as discussed above, Solano County has in fact adopted and the Commission has certified the Suisun Marsh LPP.

### **Economic Impact Assessment**

The proposed amendments to the Commission’s regulations will not create or eliminate jobs within California, create new businesses or eliminate existing businesses within California, or affect the expansion of businesses currently doing business within California. The proposed amendments will not impose any direct or indirect costs on individuals, businesses, local government agencies, or state agencies.

The benefits of the proposed amendments are primarily non-monetary. The benefits will include improved and updated Commission administrative procedures, clarification of certain permitting and planning requirements, and improved clarity and consistency of the

Commission's regulations. The proposed amendments will reduce incrementally the Commission's administrative costs by allowing certain notices and other documents to be provided by electronic mail and posted on the Commission's website, rather than requiring that such notices and documents be mailed via United States mail, and by eliminating the need for a court report to attend and prepare full minutes of each Commission meeting. In addition, by clarifying certain permitting and planning requirements, including clarifying and revising the descriptions of activities that the Executive Director may authorize by an administrative permit, the proposed amendments may reduce incrementally the costs incurred by regulated entities to process permit applications (including amendments) and requests to amend Commission plan documents.

An analysis of economic and fiscal impacts is contained in the Economic and Fiscal Impact Statement (Form 399), including the supplement thereto.

### **Alternatives**

One alternative, referred to as Alternative 1, is that the Commission would not adopt any of the proposed amendments to its regulations. Under this alternative, Commission proceedings and the Commission's permitting and planning processes would continue to be conducted in accordance with the existing regulations. The Commission will likely reject this alternative because it would not meet the objectives of the proposed amendments to improve and update the Commission's administrative procedures, clarify certain permitting and planning requirements, and improve the clarity and consistency of the Commission's regulations.

Another alternative, referred to as Alternative 2, is that the Commission would adopt most of the proposed amendments, but not some of the proposed amendments as to certain regulations. This alternative could involve a number of sub-alternatives that would each be limited in scope and relate only to a particular section or subsection of the regulations. For example, the Commission might determine not to adopt the proposed amendments to section 10245 regarding the minutes of Commission meetings. As discussed above, the proposed amendments to this section would allow for less detailed meeting minutes by deleting certain existing provisions and revising the regulation to state that the Commission shall keep accurate minutes of all Commission actions taken at its meetings. Under this sub-alternative, the Commission would retain existing section 10245 without change and thereby continue to require that the Commission keep full and accurate minutes of its meetings, and continue to provide that the minutes as signed by the Executive Director and Chair shall be the original evidence of actions taken by the Commission.

Another example of a sub-alternative under Alternative 2 is that the Commission might determine not to adopt the proposed amendment to subsection 10700(e) regarding minor fill for improving shoreline appearance in connection with the rehabilitation, renovation,

remodeling, or replacement of a pre-existing residential structure. As discussed above, the proposed amendments to this subsection would allow a rehabilitated, renovated, remodeled, or replaced residential structure to cover the same area of Bay surface as the pre-existing structure (*i.e.*, to not be reduced in size over the Bay), which represents a significant change from past and current Commission policy. Instead, the Commission would retain the existing text of this regulation that requires a rehabilitated, renovated, remodeled or replaced residential structure to cover less of the Bay surface than the pre-existing structure (*i.e.*, to be reduced in size over the Bay) in recognition of that fact that residential use of the Bay is a nonconforming use inconsistent with both the water-oriented use test under Government Code section 66605(a) and the Public Trust Doctrine.

A third alternative, referred to as Alternative 3, is that the Commission would adopt most of the proposed amendments, but as to certain regulations would adopt revised or alternative amendments. This alternative, like Alternative 2, could involve a number of sub-alternatives that would each be limited in scope and relate only to a particular section or subsection of the regulations. For example, under the proposed amendments to subsection 10123(a), for an area that would fall within the Commission's jurisdiction only as the result of the natural destruction of a man-made works to remain excluded from the Commission's jurisdiction for more than one year, an affected property owner would be required to give the Commission written notice within 180 days of the event or occurrence causing the natural destruction of the man-made works and provide an estimate of the time that will be required to complete the repairs of the destruction that exceeds one year after the event or occurrence causing such natural destruction. Instead of requiring the affecting property owner to provide such a notice and estimate within 180 days of the event or occurrence causing the natural destruction of the man-made works, the Commission might determine to adopt a revised version of the proposed amendment to subsection 10123(a) that would allow an affected property owner additional time, such as 270 days or 365 days, to provide such a notice and estimate.

Another example of a sub-alternative under Alternative 3 is that the Commission might adopt revised versions of some of the proposed amendments to section 10601, which describes the categories of activities that constitute "minor repairs or improvements" that the Executive Director may authorize by an administrative permit. More specifically, the Commission might determine not to add certain categories of activities to this section, as set forth in the proposed amendments, and to require that those activities be considered for authorization by the Commission following submission of an application for a major permit. The Commission might also determine to decrease or increase the area or volume limitations associated with certain categories activities, as set forth in the proposed amendments, that would constitute "minor repairs or improvements" that the Executive Director may authorize by an administrative permit.

### **Impact on Small Businesses**

The proposed amendments to the Commission's regulations will impact small businesses, just as they would impact other businesses, individuals, local government agencies, and state agencies. However, as discussed above, the proposed amendments will not impose any direct or indirect costs on individuals, businesses, local government agencies, or state agencies. Moreover, as also discussed above, by clarifying certain permitting and planning requirements, the proposed amendments may reduce incrementally the costs incurred by all regulated entities, including small businesses, to process permit applications (including amendments) and any requests to amend Commission plan documents.

### **Technical Studies and Other Materials Relied Upon.**

The Commission did not rely on any technical studies, reports, or similar documents in proposing amendments to its regulations. The documents including in the rulemaking as of the date of this Initial Statement of Reasons are listed in the accompanying Notice of Proposed Rulemaking.

### **No Comparable Federal Regulations.**

There are no existing comparable federal regulations or statutes. Therefore, the proposed amendments to the Commission regulations would not conflict with or duplicate any federal regulations addressing the same issues.

### **California Environmental Quality Act (CEQA).**

The proposed amendments, like the existing regulations, address and govern Commission administrative procedures and the Commission's permitting and planning and processes. Because the proposed amendments relate exclusively to administrative, permitting, and planning procedural matters, there is no possibility that the proposed amendments may have a significant effect on the environment. Therefore, the Commission's consideration or adoption of the proposed amendments is exempt from CEQA. 14 C.C.R. § 15061(b)(1). The proposed amendments also are categorically exempt from CEQA as an action by a regulatory agency for the protection of natural resources and the environment. 14 C.C.R. §§ 15307 and 15308.