

# San Francisco Bay Conservation and Development Commission

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March 5, 2021

**TO:** Commissioners and Alternates

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**SUBJECT: Public Hearing on Proposed Amendments to Commission Regulations Concerning Administrative/Procedural, Permitting and Planning Matters**  
(For Commission consideration on March 18, 2021)

## Introduction

On December 17, 2020, the Commission authorized staff to initiate the rulemaking process, in accordance with the Administrative Procedure Act, to adopt proposed amendments to the Commission's regulations concerning administrative/procedural, permitting, and planning matters. On January 27, 2021, the Commission issued a Notice of Proposed Rulemaking, which commenced a public review and comment period, and posted on the Commission's website the Notice of Proposed Rulemaking, the text of the proposed amendments, the Initial Statement of Reasons, and other documents in the rulemaking file.

At the Commission meeting on March 18, 2021, the Commission will hold a public hearing on the proposed amendments to its regulations concerning administrative/procedural, permitting, and planning matters. Written comments will be accepted through 5:00 p.m. on March 18th. The Commission may vote on the proposed amendments at a subsequent meeting.

## Background

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 was briefed and held a public hearing on the proposed amendments to certain regulations. Following the public hearing, the Commission voted to authorize staff to initiate the rulemaking process to amend the regulations.

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.

## Proposal Summary

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. The Initial Statement of Reasons includes a detailed section-by-section description of the proposed amendments.

### **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, 10286-10288.
- 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 posted on the Commission's website. Sections 10213, 10214, 10504, 10505, 10620, 11001, 11002, 11005, 11020, 11101, 11202, 11203, 11204, and 11205.
- J. Revise several 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.

### **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.

## 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.

## Revisions to the Proposed Amendments Presented at the December 17, 2020 Commission Meeting

In response to comments provided by Commissioners following the briefing and public hearing on December 17<sup>th</sup>, staff has made further revisions to the proposed amendments to certain of the Commission’s regulations on ex parte communications, specifically sections 10281, 10284, and 10286. In addition, upon further consideration, staff has made additional proposed revisions to: (1) section 10271, which governs the membership and function of the ECRB; and (2) section 10601, which 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). Each of the revisions to the proposed amendments presented at the

December 17<sup>th</sup> Commission meeting (hereafter referred to as “the original proposal”) is described below. The full text of the revised proposed amendments to sections 10281, 10284, 10286, 10271, and 10601 are set forth in the final section of this staff report.

#### **A. Ex Parte Communications and Disclosures**

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

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 original proposal did not include changes to section 10281. In response to Commissioner comments provided at the December 17<sup>th</sup> Commission meeting, staff now proposes that section 10281 be amended in a number of respects.

First, the existing text 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. (If a Commissioner chooses to respond to such a communication, the response would be an ex parte communication requiring disclosure in accordance with section 10283.)

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.

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

Section 10284 lists several types of ex parte communications that are not prohibited and do not require any type of disclosure into the record. The original proposal would have added a new subsection 10284(f) to state that an ex parte communication is not prohibited and does not require disclosure if the communication is in writing to the full Commission or any Commissioner and the recipient responds only by acknowledging receipt of the communication, thanking the sender for his, her, or its interest in the matter, and/or informing the sender that the recipient is unable to comment on or discuss the matter due to the Commission's regulations prohibiting ex parte communications. The revised proposed amendments to section 10281 discussed above, particularly new subsections 10281(b) and (c), more fully address the intent of the originally proposed new subsection 10284(f), and, therefore, subsection 10284(f) has been deleted from the revised proposed amendments.

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

Subsection 10284(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. The original proposal clarified the Executive Director's notification obligations, depending 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. If the disclosure occurs prior to the Commission meeting, the Executive Director would 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. If the disclosure occurs at the Commission meeting, the Executive Director would provide notice of the disclosure orally on the record when the agenda item that is the subject of the ex parte communication is called for consideration by the Commission.

The revised proposed amendments primarily modify the final sentence of this subsection that addresses when a disclosure occurs at the Commission meeting at which the Commission will consider the matter that is the subject of the ex parte communication. In that situation, the revised amendments provide that the disclosure shall occur in writing as provided in subsections 10283(c) or (d), as applicable, and that notice of the disclosure shall be provided orally by the

Commissioner making the disclosure (rather than by the Executive Director) prior to the Commission's consideration of the matter that is the subject of the communication. The revised proposed amendments do not make any changes to original proposal as to subsections 10286(b), (c), or (d).

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

Section 10271 addresses the membership and function of the Engineering Criteria Review Board ("ECRB"), one of the Commission's advisory boards. The first sentence of this section, which the original proposal redesignated as subsection 10271(a), states that the ECRB shall consist of not more than eleven members, including at least one geologist, one civil engineer specializing in soils, one structural engineer, and one architect. The original proposal added one "coastal engineer" to the list of professional qualifications that are required to be represented on the ECRB; this change was proposed to enhance the ECRB's ability to address issues relating to the critical challenges associated with adaptation to sea level rise.

Upon further consideration, staff proposes additional revisions to subsection 10271(a) regarding the maximum number of ECRB members and the qualifications of certain ECRB members. Specifically, staff proposes that this subsection be amended to: (1) reduce the maximum number of ECRB members from eleven to nine; (2) substitute "engineering geologist" for "geologist" as a qualification of at least one ECRB member; and (3) delete "architect" as a qualification of at least one ECRB member.

Staff proposes that the maximum number of ECRB members be reduced from eleven to nine because eleven is an unnecessarily large number of advisory board members (by comparison, the Design Review Board consists of seven members). Moreover, it has historically been difficult to find eleven professionals to volunteer to serve on the ECRB; to the best of the knowledge of current BCDC staff, the ECRB has never had eleven members. Staff proposes that "engineering geologist" be substituted for "geologist" as a qualification of at least one ECRB member based on the recommendation of the ECRB's former geologist, who resigned from the ECRB about a year ago; he suggested replacing the geologist position with someone with both an engineering geology and geotechnical license/experience to provide more flexibility in project review. An engineering geologist is a more appropriate qualification for at least one ECRB member than a geologist because engineering geologists commonly work with civil and structural engineers to ensure that the geologic factors affecting the location, design, construction, operation, and maintenance of engineering works are recognized and adequately considered. Finally, staff proposes that "architect" be deleted as a qualification of at least one ECRB member based on the recommendation of ECRB's former architect, who also resigned from the ECRB about a year ago; she commented that there does not seem to be a need for an architect on the ECRB because its purview is primarily on geotechnical and structural issues, and, therefore, there is not a lot of material for architectural review.

The original proposal added subsection 10271(c) to specify that six members shall constitute a quorum for ECRB meetings. Consistent with the proposed reduction in the maximum number of

ECRB members from eleven to nine, as discussed above, staff proposes that subsection 10271(c) be revised to specify that five members shall constitute a quorum.

The original proposal added subsection 10271(d) to specify that the Chair of the Commission may designate with the concurrence of the Commission up to seven individuals to act as a pool of alternates to substitute for current Board members who cannot participate in any Board meeting or the consideration of any specific matter at any Board meeting. Upon further consideration, staff proposes that subsection 10271(d) be revised to reduce the number of alternates from seven to four, which would be an adequate number for a pool of alternates given both: (1) the proposed reduction in the maximum number of ECRB members from eleven to nine; and (2) the difficulties that have historically been experienced in finding professionals to volunteer to serve on the ECRB.

Finally, the original proposal added subsection 10271(e) to authorize the Executive Director, when fewer than all eleven members of the ECRB will be available to participate in the Board's consideration of a matter, to designate one or more alternate Board members selected from the pool established pursuant to subsection 10271(d) to substitute for the Board member or members who cannot participate in the Board's consideration of the matter. Consistent with the proposed reduction in the maximum number of ECRB members from eleven to nine, as discussed above, staff proposes that subsection 10271(e) be revised to change each of the two references to "eleven" ECRB members to "nine."

### **C. 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. The original proposal included numerous changes to provide greater specificity and clarity regarding the activities that may be authorized by an administrative permit. Upon further consideration, staff proposes additional revisions to two new proposed subsections, 10601(a)(9) and 10601(c)(3), and one existing subsection, 10601(e)(4), as discussed below.

Subsection 10601(a) 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 original proposal added a new subsection 10601(a)(9) 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. Upon further consideration, staff proposes to revise this subsection to allow habitat restoration or enhancement activities that would not exceed 20,000 square feet in the Bay or a certain waterway, would include the minimum amount of fill necessary to improve wildlife habitat, and would not have significant adverse habitat conversion impacts.

Like the original proposal, the revised proposed subsection 10601(a)(9) is consistent with the Commission's recently adopted Bay Plan policies to allow fill for habitat projects. A 10,000-square-foot fill limitation was originally proposed to be consistent with the same area limitation for new

shoreline protective works and repairs to existing protective works under existing subsection 10601(a)(2)(B). However, staff believes that it is appropriate to authorize habitat restoration or enhancement activities in the Bay or a certain waterway by an administrative permit over a greater area than the originally proposed 10,000-square-foot limit because habitat projects often necessitate a shallower slope than shoreline protection projects and also provide benefits to wildlife. Increasing the square-footage limitation to 20,000 square feet may encourage more habitat restoration and enhancement projects along the shoreline, rather than traditional shoreline protection projects. The U.S. Army Corps of Engineers (“USACE”) uses “nationwide permits” issued under Section 404 of the Clean Water Act to authorize certain projects through a similar process to the Commission’s administrative permit process. The USACE’s Nationwide Permit 27 is for habitat restoration or enhancement projects but does not directly address the allowable fill area or volume for such projects. However, the proposed 20,000 square-foot limit in revised subsection 10601(a)(9) is similar in size to the activities that the USACE can authorize using a nationwide permit in tidal waters for non-habitat purposes (*e.g.*, utilities, pipelines, etc.). To qualify for an administrative permit under revised subsection 10601(a)(9), a habitat restoration or enhancement project would be required to include the minimum amount of fill necessary to improve wildlife habitat, which would also achieve the related goal of maximizing water surface area, and to not have significant adverse habitat conversion impacts.

Subsection 10601(c) applies to certain activities within the Commission’s salt ponds and managed wetlands jurisdictions. The original proposal added a new subsection 10601(c)(3), consistent with the originally proposed new subsection 10601(a)(9), discussed above, 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. Upon further consideration, staff proposes to revise this subsection to allow habitat restoration or enhancement activities that would not exceed 50 acres in salt ponds or managed wetlands and would include the minimum amount of fill necessary to improve wildlife habitat.

Like the original proposal, the revised proposed subsection 10601(c)(3) is consistent with the Commission’s recently adopted Bay Plan policies to allow fill for habitat projects. A 10,000-square-foot fill limitation was originally proposed to be consistent with the same area limitation for new shoreline protective works and repairs to existing protective works under existing subsection 10601(a)(2)(B) and with the originally proposed new subsection 10601(a)(9), discussed above. However, since the December 17<sup>th</sup> Commission meeting, staff has analyzed salt pond and managed wetland restoration projects in EcoAtlas that are either completed, in-progress, or in planning phases to identify the sizes of habitat restoration or enhancement project in these jurisdictional areas. (EcoAtlas is a statewide database developed by the San Francisco Estuary Institute that provides information on the quantity and quality of California wetlands.) Based on that review, staff believes that administrative authorization of these types of activities up to a 50-acre project size limitation is appropriate to facilitate permitting of habitat restoration or enhancement projects while reserving larger such projects for Commission consideration as major permit applications. To

qualify for an administrative permit under revised subsection 10601(c)(3), a habitat restoration or enhancement project would be required to include the minimum amount of fill necessary to improve wildlife habitat, which would also achieve the related goal of maximizing water surface area.

Subsection 10601(e) applies to certain activities anywhere in the Commission's jurisdiction. The original proposal did not include any changes to subsection 10601(e). On further review, staff proposes to make a minor change to subsection 10601(e)(4), which authorizes “the placement of facilities required for environmental quality testing that does not involve *placement of fill*, change in use or alteration of public access for a period of time longer than provided by the permit for completion of the work, and would not otherwise have a substantial effect on Bay-related resources.” The proposed change is to delete the words “placement of fill,” as shown in italics in the preceding quote, because the placement of facilities required for environmental quality testing may unavoidably involve the placement of minor amounts of fill within an area of the Commission’s jurisdiction.

## Alternatives

As discussed in the Initial Statement of Reasons, 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, but not some, of the proposed amendments as to certain regulations. This alternative could involve 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. 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. 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, 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 different amendments. This alternative, like Alternative 2, could involve 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 affected 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. The revised proposed amendments to section 10601 developed by staff since the December 17<sup>th</sup> Commission meeting, which are discussed above, are sub-alternatives under Alternative 3. The Commission might also determine not to add certain categories of activities to section 10601, 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 of 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. Finally, the revised proposed amendments to section 10271, regarding membership of the ECRB, as discussed above, are also sub-alternatives under Alternative 3.

### Accompanying Documents

The following documents in the rulemaking file accompany this staff report and are also posted on the Commission's website:

- Text of the Proposed Amendments (with added text shown in underscore and deleted text shown in strikeout)
- Initial Statement of Reasons
- Notice of Proposed Rulemaking

### Text of Revised Proposed Amendments

#### **10281. Definition of an Ex Parte Communication.**

(a) An ex parte communication is any oral or written communication, direct or indirect, regarding a pending adjudicatory proceeding between a member of the Commission and either any party to the pending Commission adjudicatory proceeding or a member of the public that does not occur in a Commission public hearing, Commission workshop, or other official Commission proceeding or on the official Commission record for the proceeding. Except as provided in subsection 10281(b), this 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.

(b) The Commission is required by law to provide an opportunity for members of the public to address the Commission on each agenda item noticed for consideration at a Commission meeting, including pending adjudicatory proceedings, before or during the Commission's consideration of the item. 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 provided that the Commissioner receiving the communication does not respond thereto.

(c) 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 matter that is the subject of the communication, and no Commissioner shall have an obligation to disclose the communication. 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 Commission's consideration of the matter that is the subject of the communication, and no Commissioner shall have an obligation to disclose the communication.

#### **10284. Permissible Ex Parte Communications.**

The following types of ex parte communications are not prohibited by these regulations and do not require any disclosure into the record:

(a) communications specifically authorized by statute and required for the disposition of an adjudicatory matter;

(b) the communication involves a matter of procedure or practice that is not in controversy;

(c) the communication is from an employee or representative of BCDC who has not served as an investigator, prosecutor, or advocate during the proceeding or in its pre-adjudicative state-stage and whose purpose is to assist or advise the Commission;

(d) the communication is from an employee or representative of BCDC and concerns a settlement proposal advocated by the employee or representative; and

(e) the communication is from an employee or representative of BCDC and involves a non-prosecutorial proceeding.

#### **10286. Notification of Parties and Interested Persons.**

(a) As soon as is practicable, ~~the Executive Director shall notify in writing and prior to the Commission's consideration of the matter that is the subject of an ex parte communication, all parties to a proceeding and all persons interested in the proceeding shall be notified that a Commissioner has received an impermissible ex parte communication. If the disclosure occurs prior to the Commission meeting at which the Commission considers the matter that is the subject of the ex parte communication, 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. If the disclosure occurs at the Commission meeting at which the Commission considers 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 on the record by the Commissioner making the disclosure prior to the Commission's consideration of the matter that is the subject of the communication.~~

(b) If the communication was received orally, the Executive Director shall include a copy of the memorandum and any response to the communication as required by Sections 10283(d) and (e) with the written notification.

(c) If the communication was received in writing, the Executive Director shall include a copy of the written communication and any response to the communication as required by Section 10283(c) with the written notification.

(d) In either case, the notice shall also 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 to address the Commission concerning the communication within 10 days of receiving the notice or the party or person shall waive the opportunity to address the Commission.

#### **10271. Membership and Function of Engineering Criteria Review Board.**

(a) The Engineering Criteria Review Board shall consist of not more than ~~eleven (11)~~ nine (9) members, including at least one (1) engineering geologist, one (1) civil engineer specializing in soils, one (1) structural engineer, and one (1) coastal engineer and one (1) architect.

(b) The Board shall advise the Commission on problems relating to the safety of fills and of structures on fills for projects within the Commission's Bay or certain waterways jurisdictions for which a Commission permit or consideration of a consistency determination is needed.

(c) ~~Six~~ Five members shall constitute a quorum for Board meetings and shall be the minimum necessary for the Board to consider any matter.

(d) The Chair of the Commission may designate with the concurrence of the Commission up to ~~seven~~ four individuals to act as a pool of alternates to substitute for current Board members who cannot participate in any Board meeting or the consideration of any specific matter at any Board meeting.

(e) When fewer than all ~~eleven~~ nine members of the Board will be available to participate in the Board's consideration of a matter, the Executive Director may designate one or more alternate Board members selected from the pool established pursuant to paragraph (d) to substitute for the Board member or members who cannot participate in the Board's consideration of any action on that matter so long as the total number of Board members that considers a matter does not exceed ~~eleven~~ nine.

(f) When designating an alternate Board member pursuant to paragraph (e), the Executive Director shall select an individual in a professional discipline and with professional experience as much as possible like those of the Board member who cannot participate in the Board's consideration of the particular matter.

(g) Alternate Board members designated pursuant to paragraphs (e) and (f) shall have the same powers and authority to participate in the Board's consideration and action on any matter as a regular Board member.

(h) The term of appointment of Board members or ~~alternatives~~ alternates pursuant to subsection (a) or (d) shall be five years and may be renewed by the Executive Director for two successive periods of five years as a member or an alternate.

(i) Sections 10280 to 10289 (Chapter 2, Article 8, Ex Parte Communications) shall apply to Board members.

**10601. Minor Repairs or Improvements.**

“Minor repairs or improvements” means any activity for which a Commission permit is required, that is either (a) necessary to the health, safety, or welfare of the public in the entire Bay Area, (b) consistent with the Government Code sections 66600 through 66661 and the San Francisco Bay Plan, or (c) consistent with the Public Resources Code sections 29000 through 29612 and Suisun Marsh Protection Plan or with the certified Suisun Marsh Local Protection Program, and that falls into one or more of the following categories:

(a) with respect to activities in San Francisco Bay and areas within the Commission’s “certain waterways” jurisdiction:

(1) the construction of a new single boat dock and associated docking facilities (such as lifts, gangways, and pilings) no larger than ~~1,000~~ 1,500 square feet or a new multiple boat dock and associated facilities no larger than 5,000 square feet, or up to 20,000 square feet of expansion of boat docking facilities within an existing marina;

(2) the installation of new shoreline protective works and repairs to ~~existing~~ protective works, such as bulkheads, levees, natural or nature-based features, and riprap, that meet the following criteria:

(A) the size of the new work(s) or the repairs to the existing work(s) constitute the minimum amount of fill necessary to stabilize existing dikes and banks or to provide improved fish or wildlife habitat, and

(B) the new work or repairs to existing work(s) would cover less than 10,000 square feet of ~~the horizontal projection of the work below the shoreline~~ the Bay or a certain waterway;

(3) the placement of piles to support extensions of portions of principal structures, as defined in section 10702(b), over the water where the total of any such extensions would not exceed 1,000 square feet in area;

(4) the placement of outfall pipes approved by the California Regional Water Quality Control Board, San Francisco Bay Region;

(5) the placement of utility cables or pipelines on or under the bottom of the Bay or a certain waterway;

(6) routine repairs, reconstruction, replacement, removal, ~~and~~ or maintenance of a structure that do not involve any substantial enlargement or change in use;

(7) minor fill for improving shoreline appearance that complies with section 10700 and that does not exceed 1,000 square feet in area; ~~and~~

(8) minor fill for improving public access that complies with section 10701 and that does not exceed ~~1,000~~ 5,000 square feet in area;

(9) minor fill for habitat restoration or enhancement activities that would cover less than not exceed ~~10,000~~ 20,000 square feet of in the Bay or a certain waterway, would include the minimum amount of fill necessary to improve wildlife habitat, and would not have significant adverse habitat conversion impacts; and

(10) 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.

(b) with respect to activities in the 100-foot shoreline band:

(1) the placement of small amounts of inert inorganic fill, the extraction of small amounts of materials, or a substantial change of use of any area so long as the placement, extraction, or change in use does not have a significant adverse effect on ~~present~~ existing or possible future ~~maximum feasible~~ public access ~~to the Bay consistent with the project~~, on present or possible future use for a designated ~~priority water-related~~ water-oriented priority land use, ~~and or~~ on the environment;

(2) the construction of one- and two-family residences and ancillary residential structures on any parcel except in cases where the parcel was subdivided after June 17, 1987 and the subdivision was not authorized by a Commission permit, or when the residence would adversely affect existing physical or visual public access, or affect potential visual public access;

(3) any substantial change in use of a structure built on piles placed over the Bay prior to September 17, 1965 where the change in use does not involve any change in the structure, piles, or the extent of water coverage;

(4) the installation of new shoreline protective works and repairs to ~~existing~~ protective works, such as bulkheads, levees, natural or nature-based features, and riprap, in the minimum amount necessary to stabilize existing dikes and banks or to provide improved fish or wildlife habitat;

(5) routine repairs, reconstruction, replacement, removal, ~~and or~~ maintenance of a structure that do not involve any substantial enlargement or any substantial change in uses; and

(6) any subdivision of land or other division of land.

(c) with respect to activities in salt ponds and managed wetlands:

(1) the reconstruction of ~~existing~~ power transmission towers, communication towers, and walkways providing access to such towers; ~~and~~

(2) the installation of new shoreline protective works and repairs to protective works, such as bulkheads, levees, natural or nature-based features, and riprap, in the minimum amount of fill necessary to stabilize existing dikes or to provide improved wildlife habitat;

~~(3) minor fill for habitat restoration or enhancement activities that would cover less than 10,000 square feet of~~ not exceed 50 acres in salt ponds or managed wetlands and would include the minimum amount of fill necessary to improve wildlife habitat; and

(4) extraction or dredging of no more than 10,000 cubic yards of materials to enhance tidal connectivity or restore habitat or the disposal such materials within an existing site for such purposes.

(d) with respect to activities in the Suisun Marsh:

(1) one or more of the activities listed in paragraph (a), (b), or (c) of this section;

(2) any subdivision of land or other division of land, including lot splits;

(3) the removal of vegetation;

(4) the discharge of any gaseous, liquid, or thermal waste as approved by the California Regional Water Quality Control Board, San Francisco Bay Region;

(5) the grading of any materials; and

(6) the construction, reconstruction, relocation, demolition, or alteration of the size of any one- or two-family residence, duck club structure, farm structure and ancillary structures, and any facility of any private, public, or municipal electrical generating facility with a capacity of less than ten (10) megawatts electrical (10MWe), and any other private, public, or municipal utility facility of less than 10,000 square feet.

(e) with respect to activities anywhere in the Commission's jurisdiction:

(1) the placement of a temporary structure provided that the structure is removed no later than 180 days after its placement and the area is returned to its pre-existing condition within a reasonable time thereafter;

(2) the temporary substantial change in use of water, land, or a structure, provided that the initial use is reestablished no later than 180 days after the temporary change in use;

(3) any other activity similar to those listed in paragraphs (a), (b), (c), and (d) of this section that would have no greater adverse impact on the Bay than the listed activities; and

(4) the placement of facilities required for environmental quality testing that does not involve ~~placement of fill,~~ a change in use or alteration of public access for a period of time longer

than provided by the permit for completion of the work, and would not otherwise have a substantial effect on Bay-related resources.

(f) with respect to dredging or disposal activities located anywhere within the Commission's jurisdiction, those activities specified in Section 10602.