

# *The Regulatory Reach of BCDC's Bay Plan*

## Summary

**The Bay Plan is not confined to “advisory” status regarding projects and activates outside BCDC’s formal jurisdiction. To the contrary, the Bay Plan has the force of binding federal law under the Coastal Zone Management Act with respect to any project or activity involving a federal permit or assistance (including financial assistance, insurance, and/or guarantees), whether or not located in BCDC’s formal jurisdiction. The Bay Plan also has significant regulatory impact under the California Environmental Quality Act. BCDC staff’s “analysis” to the contrary misstates the legal question at issue, continues a pattern and practice of mischaracterizing the Coalition’s legal (and policy) arguments, and ultimately gets it dead wrong on the law.**

In a report to Commissioners and Interested Parties dated November 12, 2010, BCDC staff wrote that “there has been considerable controversy” over amendments to the Commission's Bay Plan to deal with sea level rise. At the core of the controversy are two issues: (1) whether BCDC staff’s proposed language (the “third preliminary recommendation,” dated Sept. 3, 2010) represents good public policy; and (2) whether the policies proposed by staff will have the force of binding regulation by virtue of being incorporated into BCDC’s Bay Plan, as staff has proposed.<sup>1</sup> In responding to widespread and growing concern about the merits of the proposed language, BCDC staff has largely focused on attempting to persuade stakeholders that whatever their objections, interest in the proposed language—much less significant concern over it—is unwarranted because it

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<sup>1</sup> The November 12 report continues to conflate two separate legal issues: (1) the regulatory reach of the Bay Plan (*i.e.*, whether its policies are have regulatory effect as to projects and activities outside BCDC’s formal jurisdiction pursuant to laws and regulations *other than the McAteer-Petris Act*); and (2) whether BCDC intends to seek legislation to expand its formal jurisdiction as defined *in the McAteer-Petris Act*. This analysis addresses the former. The latter was assumed to be answered definitely in the negative by BCDC staff at the October 29 workshop and elsewhere, but the accuracy of that assumption is questionable in light of the November 12 report’s retreat from other previously articulated positions.

will have no regulatory effect outside of the 100-foot shoreline band that represents BCDC's permit jurisdiction under the McAteer-Petris Act. At the October 21 public hearing, BCDC staff read this excerpt from Gov. Code Sec. 66653—"If a function or activity is outside the area of the commission's jurisdiction or does not require the issuance of a permit, any provisions of the plan pertaining thereto are advisory only"—and told the Commission and public that this statute precludes the Bay Plan's policies and provisions from having any formal regulatory effect over projects outside the 100-foot shoreline band, and therefore any contrary argument is without merit. Staff continued by saying that its "advisory" nature means the Bay Plan cannot be an "applicable plan" under CEQA that can trigger a finding of potentially significant impact (and the need to undertake a full-blown EIR and adopt all feasible mitigation measures) for projects and activities based on asserted inconsistency with the Bay Plan.

Following the October 21 hearing, BCDC staff has mounted an aggressive lobbying campaign to convince local officials and others that concern over the proposed language is unwarranted because it is intended to be advisory only, and in any event cannot have any regulatory impact as a matter of law. Certain Commissioners, in good-faith reliance on the assurances of BCDC staff, have also made these appeals. Staff's Nov. 12, 2010 report echoes these assertions.

BCDC staff's position is unequivocally wrong. In fact, in a published California court decision to which BCDC itself was a party, the Court of Appeal held that the Bay Plan has the force of federal and state law, and BCDC can apply its provisions to any project or activity that requires a federal permit *or* receives any federal assistance, if BCDC determines the project *affects* any land or water within BCDC's formal jurisdiction—even if the project is located *entirely* outside BCDC's permit jurisdiction. The case—*Acme Fill Corporation v. San Francisco Bay Conservation and Development Commission* (1986) 187 Cal.App.3d 1056 ("*Acme Fill*")—involved BCDC's ultimately successful attempt to force a private landfill expansion project located on 125 acres "one mile inland from the shoreline of San Francisco Bay and two miles east of Martinez," to comply with policies in the Bay Plan. (*Acme Fill* at 1069-1070.)

The project proponent argued, based on exactly the same statute read into the record by BCDC staff on October 21, that because the project was located entirely

beyond BCDC's permit jurisdiction the provisions of the Bay Plan were "advisory only." (*Acme Fill* at 1069.) While the trial court ruled in Acme's favor, finding that because the site was outside BCDC's jurisdiction under the McAteer-Petris Act the Bay Plan policies were advisory, BCDC appealed the decision. The Court of Appeal reversed the trial court, holding that under the federal Coastal Zone Management Act (CZMA), BCDC's Bay Plan has the force of federal and state law, and applies to any activity requiring a federal permit or receiving federal assistance, if the proposed activity would affect land or water uses subject to BCDC's jurisdiction under McAteer-Petris. The opinion determined that "As BCDC puts it: 'The test for CZMA consistency review [which applies the Bay Plan policies to the proposed project] is whether an activity affects land and water uses within BCDC's permit jurisdiction, not whether the activity itself is in or outside that permit jurisdiction....' [W]e conclude BCDC has authority under the CZMA to conduct a consistency review for any activity, *wherever located*, which will have consequences for the bay." (*Acme Fill* at 1066, 1070) (original quotations and emphasis.) The Court also rejected Acme's argument that the Bay Plan policies should not apply to the project because they conflicted with the County's general plan and solid waste management plan which designated the site for landfill expansion, finding that "it is manifest that the Legislature intended BCDC to 'intervene' in land use management practices that had traditionally been left to local governments." (*Acme Fill* at 1072.)<sup>2</sup>

In its November 12 report, BCDC staff asserts that *Acme Fill* was an anomaly, the result based entirely on the fact that the project was located in an area designated in BCDC's Bay Plan as a water-related industrial site. Nothing in the Court's opinion supports this interpretation; in fact, the opinion's sweeping language is utterly inconsistent with the notion that the case turned on the subject-matter of the specific Bay Plan policy that happened to be at issue in the case. As the Court made clear, the relevance of the Bay Plan's site designation in the case stemmed from the policy's *inclusion in the Bay Plan*, and it was the conflict with the Bay Plan policy that BCDC determined justified its disapproval of the project. Any sea level rise language amended

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<sup>2</sup> Prior to the state court proceedings, the U.S. Army Corps of Engineers had agreed with Acme that BCDC lacked jurisdiction and issued the 404 permit. In response, BCDC filed suit in federal court to compel the Corps to revoke the permit. The federal litigation was stayed and became moot once the state appellate court issued its decision.

into the Bay Plan would have precisely the same status under the CZMA as BCDC's policies related to water-industrial sites, unless it contained clear and unmistakable language identifying it as purely advisory. It should be noted that there is authority approving that practice. *See* 53 Ops. Atty. Gen. 285 (1970) (Where BCDC identifies language in the Bay Plan that is identified in italic print as not intended to be enforceable policies of the agency, the language is not considered "to be in any way part of the San Francisco Bay Plan.") ***To date, however, BCDC staff has refused to include such language in any iteration of its proposals.***<sup>3</sup>

BCDC's website confirms the law described in *Acme Fill* and directly contradicts staff's November 12 report. The site describes BCDC's implementation of the CMZA for the San Francisco Bay Segment of the California Coastal Zone, explaining that if BCDC determines that an activity is not consistent with the Bay Plan, "the activity cannot proceed. The Project sponsor can, however, appeal the Commission's objection to the Secretary of Commerce. If the Secretary finds that the activity would be consistent with the objectives of the Coastal Zone Management Act, or necessary for national security, the Secretary can authorize the activity despite the Commission's objection." ([http://www.bcdc.ca.gov/laws\\_plans/plans/sfbay\\_plan#8](http://www.bcdc.ca.gov/laws_plans/plans/sfbay_plan#8)).

As noted above, BCDC may require any project or activity that requires a federal permit or that receives federal assistance, to be consistent with the Bay Plan based on its determination of potential impacts to the Bay. The universe of projects and activities that trigger this authority is vast, and includes, but is not limited to: (1) any public or private project requiring a permit under Section 9 and 10 of the Rivers and Harbors Act, Sections 402, 404, and 405 of the Clean Water Act, various permits from the U.S. Department of Transportation, Department of the Interior, Federal Energy Commission, and federal

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<sup>3</sup> In light of staff's steadfast refusal to draft and circulate language clearly providing that its proposals are advisory—a puzzling position since it would seem to be an easy and obvious way to allay concerns and take the issue off the table—the November 12 report does battle with a straw man when it criticizes "opponents" of staff's proposals for not explaining "how the CZMA would allow the Commission to require consistency with the advisory policies in shoreline areas outside its jurisdiction..." While certainly brazen, this argument is nonetheless highly misleading, as it relies on the sleight-of-hand assumption that staff's ***currently proposed language*** is advisory—the very legal question at issue. Obviously, if the language ultimately adopted by the Commission is written such that it is clearly advisory—an approach that, again, BCDC staff has resisted for the better part of 2 years—then it would not trigger CZMA consistency review.

licenses for rights-of-way on public lands; **OR** (2) any activity or project that receives a federal grant, contract, loan, subsidy, guarantee, insurance, or other form of financial aid. (15 Code of Federal Regulations, §§ 930.51, 930.91.)<sup>4</sup>

As shown by the contents of its own web site and its regular practice when reviewing projects and activities outside its permit jurisdiction, not only is BCDC staff well aware of the broad scope of the Bay Plan’s formal regulatory status under federal law, it has zealously fought any effort to narrow it. In 2003, the U.S. Department of Commerce proposed amending federal regulations in a manner that in BCDC’s opinion

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<sup>4</sup> For example, when the U.S. Army Corps of Engineers adopted new Nationwide Permits (NWPs) under the Clean Water Act in 2006, BCDC, acting through its Executive Director, took the position that no project or activity authorized by the proposed NWPs—which by definition can only authorize activities that have minimal impacts both individually and cumulatively to aquatic resources—can lawfully proceed without a determination by BCDC that the activity is consistent with the agency’s plans and Coastal Management Program *including the Bay Plan*: “[To ensure consistency,] if the proposed **activity will occur outside of the Commission’s jurisdiction**, the nationwide permit should not become effective until either (1) the Commission has determined... that the proposed activity will not affect any land, water, or structure located within the Commission’s jurisdiction, (2) the Commission has determined... that the proposed activity is fully consistent with all enforceable policies in the Commission’s Management Program, or (3) the project sponsor submits a statement that the proposed activity will not affect any land, water, or structure within the Commission’s jurisdiction and the Commission fails to [timely] respond... See *attached* Letter, From: Will Travis, BCDC, To: Justin Yee, Army Corps of Engineers (November 26, 2006) (emphasis added). That BCDC took this position with respect to NWPs, again which can only authorize activities that have minor impacts both individually and cumulatively on aquatic resources, highlights the difficulty of accepting BCDC staff’s position, articulated at the October 29 hearing and repeated in the November 12 report, that concern over the proposed language is also unwarranted because BCDC will exercise significant restraint in asserting its authority under the CZMA. As to BCDC’s historical demonstration of such “restraint,” see also footnote 5.

Similarly, BCDC Chief Counsel Tim Eichenberg explained to an opponent of a power plant applying for a federal Clean Air Act permit that, “[while] the plant is not located in BCDC’s jurisdiction; that is it is not within 100 feet of the mean high tide line... the project may be subject to review under the federal Coastal Zone Management Act (CZMA). . . . Under section 307(c)(3)(A) of the CZMA a federal permit located inside or outside of the coastal zone (i.e. BCDC jurisdiction), affecting any land or water use or natural resource of the coastal zone, must provide a certification that the activity complies with the enforceable policies of the state’s coastal management program (i.e. BCDC, laws and regs), and will be conducted in a manner that is consistent with the program.” See *attached* Email, From: Tim Eichenberg, Chief Counsel, BCDC, To: Rob Simpson (Feb. 8, 2008).

In each instance described above, noticeably absent is any suggestion by BCDC staff that its CZMA review is limited to projects or activities that affect a site designated as a water-dependent priority use. To the contrary, BCDC’s Chief Counsel asserted regulatory reach over any project or activity requiring a federal permit “**affecting any land or water use or natural resource of the coastal zone (i.e. BCDC jurisdiction)**.” (emphasis added).

would restrict the scope of its authority to use the CMZA to subject projects to the Bay Plan. In response, BCDC (and the California Coastal Commission) wrote letters conveying “strong opposition” to the proposal on the basis that it would it would “substantially restrict “ the activities requiring state review and consistency with the Bay Plan.

<http://coastalmanagement.noaa.gov/consistency/media/CCCandBCDCcomments.pdf>).<sup>5</sup>

## CONCLUSION

It is beyond cavil that the contents of the Bay Plan matter: the Bay Plan has no less than the status of federal law with respect to a vast array of projects, based not on location within BCDC’s formal jurisdiction, or being located on or impacting a water-dependent site, but on the agency’s unilateral determination of whether the project or activity “will have consequences for the Bay.” Therefore, the proposed provisions for inclusion in the Bay Plan to address sea level rise matter. A lot. Once incorporated in the Bay Plan, the sea level rise policies would become binding as a matter of federal law. Any language incorporated into the Bay Plan—including that couched as “findings”—would also have a direct impact on public and private projects outside BCDC’s permit jurisdiction under CEQA.<sup>6</sup>

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<sup>5</sup>This is consistent with BCDC’s highly aggressive historical approach to the extent of its formal permit jurisdiction as well. In *Littoral Development v. San Francisco Bay Conservation and Development Commission* (1994) 24 Cal.App.4<sup>th</sup> 1050, BCDC argued that its jurisdiction is based on the highest tide ever recorded. The Court of Appeal characterized BCDC’s argument (which it rejected) as follows: “At oral argument, counsel for BCDC was asked whether BCDC jurisdiction would be established over portions of downtown San Francisco if an unusually high tide, on occasion, covered a substantial portion of Market Street. ***BCDC’s position, relying on regulation 10123, would be that such a unique tidal event would indeed establish its jurisdiction over the portion of downtown San Francisco thus flooded as part of the bay.***” (*Id.* at 1064, n. 3) (emphasis added). Presumably, this is an example of the restraint to which the November 12 report refers.

<sup>6</sup> Where BCDC has permitting jurisdiction over a project, the proposed Amendment would act as a threshold. CEQA Guidelines, Appendix G includes the following significance threshold related to land use: Would the project “conflict with any applicable land use plan, policy, or regulation of an agency ***with jurisdiction over the project?***” California Code of Regulations, Title 14, Chapter 3, Appendix G (emphasis added). This threshold applies to all projects subject to BCDC’s permitting jurisdiction. ***A project that triggers the Appendix G threshold would, in most cases, be required to prepare an Environmental Impact Report (EIR) addressing the proposed Amendment and include feasible mitigation measures, or include mitigation***

Despite all this, BCDC can easily obviate the issue—and achieve its stated goal of adopting advisory policy guidance to local governments—by adopting its final sea level rise language as a stand-alone policy guidance document with a clear statement of intent that the policies are advisory only. There is precedence for this approach, as BCDC has adopted guidance documents entitled *Shoreline Spaces: Access Design Guidelines for the San Francisco Bay* and *Shoreline Signs: Public Access Signage Guidelines*.<sup>7</sup>

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*measures or project modifications that mitigate the impact to less than significant.* 14 C.C.R. §15063(b).

· Where BCDC has authority to ensure consistency because a federal permit is required or federal financing is involved (*i.e.*, BCDC has authority under the CZMA) the proposed Amendment would likely act as a threshold under Guidelines, Appendix G, for the reasons discussed above.

· Where the project is within the inundation zone, but outside BCDC's jurisdiction and no federal permitting, financing, etc. is involved, the regulations implementing CEQA require an initial study to include an “examination of whether the project would be consistent with existing zoning, plans and other applicable land use controls.” 14 C.C.R. §15063(d)(5). While different than the threshold analysis discussed above (*i.e.*, where BCDC has jurisdiction/authority), this CEQA provision would likely require a consistency evaluation of projects covered by the proposed Amendment, in areas subject to a 55 inch sea level rise. Therefore, even though this analysis does not constitute a “threshold,” the examination of consistency with the proposed Amendment may provide substantial evidence that a significant impact may occur, triggering preparation of an EIR. At the very least, this requirement in combination with the Bay Plan Amendment would create new litigation opportunities for NIMBYs.

<sup>7</sup> As previously noted, if the language is “placed” in the Bay Plan, BCDC could explicitly provide that the policies are advisory and not enforceable. *See* 53 Ops. Atty. Gen. 285 (1970) (Where BCDC identifies language in the Bay Plan that is in italic print as not intended to be enforceable policies of the agency, the language is not considered “to be in any way part of the San Francisco Bay Plan.”)