



## Legislation Details (With Text)

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**Title:** RESOLUTION AUTHORIZING AMENDMENT NO. 6 TO AGREEMENT 244-2016AC WITH GREAT ECOLOGY TO SUPPORT THE DEVELOPMENT OF A MITIGATION BANK AT POND 20 IN THE AMOUNT OF \$117,569 TO COMPLETE HYDRODYNAMIC MODELING AND FINALIZE THE ARMY CORPS OF ENGINEERS BANKING ENABLING INSTRUMENT INCLUDING REVISIONS BASED ON COMMENTS FROM THE INTERAGENCY REVIEW TEAM FOR A NEW TOTAL NOT TO EXCEED \$983,789 AND EXTENDING THE AGREEMENT UNTIL MARCH 31, 2020. FUNDING FOR FISCAL YEAR 2020 IS BUDGETED

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Date	Ver.	Action By	Action	Result
11/5/2019	1	Board of Port Commissioners	adopted	

**DATE:** November 5, 2019

**SUBJECT:**

**RESOLUTION AUTHORIZING AMENDMENT NO. 6 TO AGREEMENT 244-2016AC WITH GREAT ECOLOGY TO SUPPORT THE DEVELOPMENT OF A MITIGATION BANK AT POND 20 IN THE AMOUNT OF \$117,569 TO COMPLETE HYDRODYNAMIC MODELING AND FINALIZE THE ARMY CORPS OF ENGINEERS BANKING ENABLING INSTRUMENT INCLUDING REVISIONS BASED ON COMMENTS FROM THE INTERAGENCY REVIEW TEAM FOR A NEW TOTAL NOT TO EXCEED \$983,789 AND EXTENDING THE AGREEMENT UNTIL MARCH 31, 2020. FUNDING FOR FISCAL YEAR 2020 IS BUDGETED**

**EXECUTIVE SUMMARY:**

Pond 20 is a 95-acre undeveloped parcel located at the southernmost portion of San Diego Bay within the City of San Diego’s Otay Mesa-Nestor Community Planning District and the City of Imperial Beach’s former Redevelopment Area. It is not currently included in the Port Master Plan. In July 2015, the Board directed staff to develop a Request for Proposals (RFP) for the development of a mitigation bank at Pond 20.

On November 8, 2016, by Resolution No. 2016-178, the Board authorized an agreement with Great Ecology to prepare design drawings, conduct a wetlands delineation in support of a U.S. Army Corps of Engineers (USACE) jurisdictional determination, and prepare mitigation banking documentation, including the Prospectus and draft Bank Enabling Instrument. Additionally, the Board approved

commencing environmental review.

The sixth amendment to the agreement with Great Ecology is needed, in the amount of \$117,569, to conduct additional hydrodynamic models for 100-year flood events in the Otay River to analyze potential impacts and mitigation options to reduce potential flooding levels associated with the proposed mitigation bank for permitting, construction design, and environmental review; and to advance additional mitigation banking elements including and preparing Interagency Review Team (IRT) responses for inclusion in the final Bank Enabling Instrument.

### **RECOMMENDATION:**

Adopt a resolution authorizing Amendment No. 6 to the Agreement with Great Ecology to support the development of a mitigation bank at Pond 20 in the amount of \$117,569 to assess additional hydrodynamic models and finalize the Army Corps of Engineers Bank Enabling Instrument based on comments from the IRT for a new total not to exceed \$983,789 and extending the agreement until March 31, 2020. Funding for fiscal year 2020 is budgeted.

### **FISCAL IMPACT:**

The Environmental Conservation department budgeted \$601,800 from the Environmental Fund this fiscal year (FY20) for mitigation banking.

### **COMPASS STRATEGIC GOALS:**

This agenda item supports the following Strategic Goals.

- A Port that the public understands and trusts.
- A vibrant waterfront destination where residents and visitors converge.
- A Port with a healthy and sustainable bay and its environment.
- A Port with a comprehensive vision for Port land and water uses integrated to regional plans.
- A financially sustainable Port that drives job creation and regional economic vitality.
- Not applicable.

### **DISCUSSION:**

#### **Brief History**

Pond 20 is a 95-acre vacant parcel of land located at the southernmost portion of San Diego Bay, in the City of San Diego (see Attachment A). Pond 20 was purchased by the District in October 1998 as a part of the Western Salt land acquisition and is not currently included in the Port Master Plan. Most of the land was transferred to the state of California as offsite mitigation for terminal expansion at the San Diego International Airport, which, led to the creation of the San Diego Bay National Wildlife Refuge (Refuge). The remaining land was retained by the District for future development, subject to the Public Trust Doctrine. When the San Diego County Regional Airport Authority (Airport) became a separate agency, Senate Bill 1896 provided for the District to retain ownership of Pond 20 by reimbursing the Airport \$3.33 million plus interest. Since acquiring Pond 20 in 1998, the District, in collaboration with the cities of Imperial Beach and San Diego, has conducted numerous public outreach processes, studies, and appraisals.

On July 14, 2015, the Board directed staff to develop an RFP for mitigation banking and to continue to analyze the development of a mitigation bank on Pond 20. On November 17, 2015, by Resolution No. 2015-151, the Board adopted BPC Policy No. 774, the Pond 20 Economic Development Fund. The purpose of the Economic Development Fund is to establish a policy for the collection and distribution of net revenue received by the District from mitigation banking or other uses or development which may occur as set forth in the policy.

On December 8, 2015, the Board directed staff to conduct due diligence, which included a feasibility assessment with an evaluation of the demand for mitigation credits, regulatory requirements for long-term maintenance, and conceptual design and construction estimates.

On June 15, 2016, a Mitigation Ad-hoc Committee (Committee) was formed to continue the due diligence efforts and to validate assumptions that a mitigation bank would be successful at Pond 20. The Committee evaluated the strengths, risks, and uncertainties associated with creating a mitigation bank.

Based on these due diligence efforts and a decision analysis conducted in response to the RFP, on November 8, 2016, by Resolution No. 2016-178, the Board authorized an agreement with Great Ecology to prepare drawings and mitigation banking documents for a wetland mitigation bank at Pond 20. Additionally, the Board adopted Resolution No. 2016-179 to commence environmental review for the Pond 20 site, including the establishment of the mitigation bank and assignment of land use designations for adjacent parcels. The environmental review will include a Port Master Plan Amendment pursuant to the California Coastal Act for the mitigation bank parcel and adjacent parcels A, B, and C.

### **Wetland Mitigation Bank Update**

The mitigation banking entitlement process is led by USACE in coordination with an Interagency Review Team (IRT) consisting of the California Coastal Commission, U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency, and Regional Water Quality Control Board. The entitlement process requires the submission of a Prospectus and Bank Enabling Instrument for USACE and IRT review and approval. The Prospectus provides an overview of the proposed mitigation bank with sufficient details to assess the technical feasibility of the bank development plan and to support informed comments regarding the bank's operational objectives. The complete Prospectus, submitted to USACE in April 2018, includes details on current site conditions, proposed site restoration, the service area where banking credits can be sold, and how the property will be maintained once constructed. The Prospectus also includes a Preliminary Title Report, a Phase 1 Environmental Site Assessment, soil quality evaluation, wetlands delineation report, and a biological resources assessment. The Prospectus was provided to the Board in a memo dated July 12, 2018. In August 2018, USACE received comments from the IRT and public on the Pond 20 Prospectus. The comments are being addressed in the next entitlement document, the Bank Enabling Instrument. The Bank Enabling Instrument is a regulatory document that codifies how mitigation credits are defined, sold, and secured, which will be submitted to USACE and the IRT in 2019.

The District is coordinating with the Otay River Estuary Restoration Project (ORERP), an adjacent habitat restoration project planned by Poseidon Resources and the U.S. Fish & Wildlife Service in the northern portion of Pond 20 on Refuge lands. ORERP is mitigation for the Carlsbad Desalination

Plant, which is providing 8% of the water supply for San Diego County. The IRT requested that the restoration projects merge functionally to create continuous habitat within northern and southern portions of Pond 20. Therefore, the ORERP team and District staff are meeting to coordinate and discuss design and grading plans, access routes, environmental review, potential hydraulic impacts, and the installation and removal of a temporary berm on Refuge lands. The temporary berm is intended to separate the two projects during construction to prevent flooding and ensure site protection for each project.

Regarding the potential sale of mitigation credits, credit transfers may begin following finalization of the Bank Enabling Instrument, according to the process outlined in the document, typically 10% of credits. The District has received inquiries from private companies, including Poseidon Resources, who are interested in mitigation credits. Additionally, other non-governmental organizations are interested in collaborating on the creation of the mitigation bank on Pond 20 to look at potential opportunities for carbon sequestration.

A Notice of Preparation (NOP) for the Environmental Impact Report (EIR) was issued on June 12, 2019 followed by a scoping meeting held in Imperial Beach on July 10, 2019. The District received ten comment letters on the NOP, including comments from the City of San Diego, California Department of Fish and Wildlife, as well as community members. Several technical studies for the EIR are currently under way on issue areas including transportation, biological resources, cultural resources, and sea level rise.

### **Agreement with Great Ecology**

The agreement with Great Ecology for mitigation bank consulting services (Attachment B), in the amount of \$640,220, includes the development of a base map; geotechnical and soil investigation; wetlands jurisdictional determination; functional assessment; 30% and 60% design and construction documents; and required documentation for regulatory permitting and long-term management, including the Prospectus and draft Bank Enabling Instrument.

Amendment No. 1 to the agreement with Great Ecology (Attachment C), in the amount of \$22,500, included additional analysis to evaluate potential impacts to the pedestrian/bikeway bridge at the Otay River, and water level monitoring to assist in evaluating the impacts of increased tidal flow due to the Pond 20 project.

Amendment No. 2 to the agreement with Great Ecology (Attachment D), in the amount of \$30,000, included an update to the Pond 20 mitigation bank design to be consistent with the proposed ORERP design, including the planned temporary berm on Refuge land.

Amendment No. 3 to the agreement with Great Ecology (Attachment E), in the amount of \$164,500, included development of a hydraulic model to assess the potential hydrodynamic and scour effects of the Pond 20 project with the ORERP project, hydraulic modeling and support services to complete environmental review technical studies, and sea level rise modeling and analysis in accordance with recent state sea level rise guidance.

Amendment No. 4 to the agreement with Great Ecology (Attachment F) extended the agreement term to December 31, 2019.

Amendment No. 5 to the agreement with Great Ecology (Attachment G), in the amount of \$9,000,

expanded the hydraulic modeling conducted under Amendment No. 3 to include additional model runs as requested by the California Coastal Commission.

### **Amendment No. 6 to Agreement with Great Ecology**

Amendment No. 6 to the agreement with Great Ecology (Attachment H), in the amount of \$117,569, will conduct additional 100-year flood event model runs. Current modeling suggests there may be 100-year flood impacts and additional runs will inform potential mitigation options to reduce flooding levels associated with the project. Great Ecology will also conduct a topographic survey of Bayside Park and the bike trail to ground-truth the topography, LiDAR data, and bike path culvert dimensions and invert elevations used in the hydrodynamic model. In addition, Great Ecology will assist staff with negotiating proposed performance metrics with the IRT. Amendment No. 6 will also complete the final portions of the draft Bank Enabling Instrument and allow for review and incorporation of IRT comments into the final Bank Enabling Instrument.

Tasks completed under Amendment No. 6 will also inform the 60% Basis of Design Report and support the environmental review and Coastal Act review planning processes. The 60% Basis of Design Report will include refined construction costs and mitigation credit estimates, which will instill a higher level of confidence in the Pond 20 mitigation bank business model. Prior to advancing the project beyond the 60% design level, staff will return to the Board for authorization to complete the 100% design and preparation of technical specifications.

### **Next Steps**

Amendment No. 6 to the agreement with Great Ecology is needed for additional hydrodynamic modeling and analyses, to complete the environmental review technical studies, meet recent state sea level rise guidance, and to facilitate California Coastal Commission and IRT mitigation banking approval. The 60% project design will be completed in coordination with the ORERP team in 2019. The 60% Basis of Design will inform the draft Bank Enabling Instrument, which will be submitted to USACE and the IRT in 2019. Prior to advancing the project beyond the 60% design level, staff will return to the Board in early 2020 for authorization to complete the 100% design and preparation of technical specifications. Staff anticipates public review of the EIR to occur in no later than summer 2020, while EIR certification is estimated to occur in late 2020. Coastal Act review, including the Port Master Plan Amendment and Coastal Development Permit, will also be completed in 2020/2021, with the goal of starting construction in fall 2021.

### **General Counsel's Comments:**

The Office of the General Counsel reviewed this agenda and approved the proposed agreement amendment as to form and legality.

### **Environmental Review:**

The Board action, including without limitation, a resolution authorizing an amendment to an agreement with Great Ecology, does not constitute an "approval" or a "project" under the definitions set forth in California Environmental Quality Act (CEQA) Guidelines Sections 15352 and 15378 because no direct or indirect changes to the physical environment would occur. CEQA requires that the District adequately assess the environmental impacts of projects and reasonably foreseeable activities that may result from projects prior to the approval of the same. Full CEQA analysis will be

completed prior to the District's commitment to a wetland mitigation bank, in whole or in part. CEQA review may result in the District, in its sole and absolute discretion, requiring implementation of mitigation measures, adopting an alternative, including without limitation, a "no project alternative" or adopting a Statement of Overriding Consideration, if required. The current Board action in no way limits the exercise of this discretion. Therefore, no further CEQA review is required.

In addition, this Board item complies with Section 87 of the Port Act, which allows for the establishment, and maintenance of tide and submerged lands for open space, ecological preservation, and habitat restoration. The Port Act was enacted by the California Legislature and is consistent with the Public Trust Doctrine. Consequently, the proposed Board action is consistent with the Public Trust Doctrine.

The proposed Board action does not allow for "development," as defined in Section 30106 of the California Coastal Act, or "new development," pursuant to Section 1.a. of the District's Coastal Development Permit (CDP) Regulations because they will not result in, without limitation, a physical change, change in use or increase the intensity of uses. Therefore, issuance of a Coastal Development Permit or exclusion is not required. However, development within the District requires processing under the District's CDP Regulations. Future development, as defined in Section 30106 of the Coastal Act, will remain subject to its own independent review pursuant to the District's certified CDP Regulations, PMP, and Chapters 3 and 8 of the Coastal Act. The Board's direction or action in no way limits the exercise of the District's discretion under the District's CDP Regulations. Therefore, issuance of a CDP or exclusion is not required at this time.

**Equal Opportunity Program:**

Due to limited known sub opportunities, no SBE goal was established for this agreement.

**PREPARED BY:**

Eileen Maher  
Director  
Environmental Conservation

Heather Kramp  
Assistant Planner  
Environmental Conservation

**Attachment(s):**

- Attachment A: Pond 20 parcel map
- Attachment B: Great Ecology Agreement
- Attachment C: Amendment No. 1 to Great Ecology Agreement
- Attachment D: Amendment No. 2 to Great Ecology Agreement
- Attachment E: Amendment No. 3 to Great Ecology Agreement
- Attachment F: Amendment No. 4 to Great Ecology Agreement
- Attachment G: Amendment No. 5 to Great Ecology Agreement
- Attachment H: Amendment No. 6 to Great Ecology Agreement