



Legislation Text

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DATE: December 11, 2018

SUBJECT:

PRESENTATION AND UPDATE ON THE ENTITLEMENT PROCESS FOR A WETLAND MITIGATION BANK AT POND 20, SOUTH SAN DIEGO BAY

EXECUTIVE SUMMARY:

Pond 20 is a 95-acre undeveloped parcel located at the southernmost portion of San Diego Bay. Pond 20 is within the City of San Diego's Otay Mesa-Nestor Community. It is included in the City of Imperial Beach's former Redevelopment Area but 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. In November 2015, the Board adopted the Pond 20 Economic Development Fund, BPC Policy No. 774.

In November 2016, the Board authorized an agreement to prepare design drawings, conduct a wetlands delineation, and prepare mitigation banking documentation, including the Prospectus and Bank Enabling Instrument. Additionally, the Board approved commencing environmental and California Coastal Act review.

The base line map, wetlands jurisdictional delineation, functional assessment methodology, preliminary design, and Prospectus are complete and have been submitted to the Army Corps of Engineers (ACOE). Environmental review is underway.

Next steps to entitle the mitigation bank include completing the 60% design, conducting technical studies for environmental review including additional hydrodynamic modeling to meet state sea level rise guidance and complete design alternatives to avoid potential wetland jurisdictional areas.

RECOMMENDATION:

Presentation and update on the entitlement of a wetland mitigation bank at Pond 20, south San Diego Bay.

FISCAL IMPACT:

This presentation does not have a fiscal impact. The Environmental Conservation department budgeted \$628,200 from the Environmental Fund this fiscal year (FY19) for mitigation banking.

COMPASS STRATEGIC GOALS:

This agenda item supports the following Strategic Goal(s).

- 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.

DISCUSSION:

Pond 20

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 (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. The majority of the land was transferred to the state of California as offsite mitigation for the expansion of Lindbergh Field, which led to the creation of the South 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 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.

Brief History

On July 14, 2015, the Board directed staff to issue an RFP for mitigation banking. On November 17, 2015, by Resolution #2015-151, the Board adopted BPC Policy No. 774 the Pond 20 Economic Development Fund. The purpose of the Pond 20 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 met to evaluate 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 #2016-178, the Board authorized an agreement with Great Ecology to prepare drawings and mitigation banking documents for a wetlands mitigation bank at Pond 20. Additionally, the Board adopted Resolution #2016-179 to commence environmental review. The environmental review will also include a Port Master Plan Amendment (PMPA) pursuant to the California Coastal Act for parcels A, B, and C, including the mitigation bank parcel.

Wetland Mitigation Bank Update

The Great Ecology agreement to entitle a mitigation bank includes the following tasks, most of which are substantially completed: develop a base map; geotechnical and soil investigation; wetlands jurisdictional determination; functional assessment; preliminary design and 60% design services; and required documentation for regulatory permitting and long-term management, including the Prospectus and draft Banking Enabling Instrument. The Banking Enabling Instrument is a regulatory document that codifies how mitigation credits are defined, sold, and secured.

The mitigation banking entitlement process is led by the ACOE in coordination with an Interagency Review Team (IRT) consisting of the California Coastal Commission (CCC), U.S. Fish and Wildlife Service, National Marine Fisheries Service, Environmental Protection Agency (EPA), and Regional Water Quality Control Board (RWQCB). The entitlement process requires the submission of a Prospectus and Banking Enabling Instrument. The Prospectus, submitted in April 2018, included details on current site conditions, proposed site restoration, the service area where banking credits can be sold, and long-term maintenance once the bank is constructed. The Prospectus also included a Preliminary Title Report, a Phase 1 Environmental Site Assessment, soil quality evaluation, wetlands delineation, and a biological resources assessment. The Prospectus was provided to the Board in a memo dated July 12, 2018. In August 2018, the ACOE received public comments on the Pond 20 Prospectus. The IRT and public comments on the Prospectus will be addressed in the next ACOE entitlement document, the Banking Enabling Instrument, which will be submitted to the IRT in Spring 2019.

The ACOE and EPA approved a sampling and analysis plan to determine disposal locations of the soil to be exported from Pond 20. Soil sampling has been completed and preliminary environmental soil test results indicate there is no soil contamination relevant to the planned soil export.

The District is coordinating with the Otay River Estuary Restoration Project (ORERP), a wetland restoration project on Refuge lands adjacent to the northern portion of Pond 20 (see Attachment B). The Refuge in conjunction with Poseidon Resources is planning a restoration project as mitigation for the desalination plant in Carlsbad, which is providing 8% of the county's water supply. The IRT requested that these restoration projects merge functionally in order to create continuous habitat within Pond 20. Therefore, the ORERP team and District staff are meeting regularly to discuss the ORERP design grading plans, access routes, environmental review technical studies, the installation and removal of a temporary berm on Refuge lands, and potential hydraulic and sea level rise impacts. The temporary berm is intended to separate the two projects during construction to prevent flooding and ensure that both projects are constructed in the dry.

Regarding the potential sale of mitigation 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.

Staff also initiated the environmental review process with a Notice of Preparation for the Environmental Impact Report to be issued in early 2019.

Next Steps

Additional hydrodynamic modeling and analyses are needed to complete the Pond 20 environmental review technical studies, meet recent state sea-level-rise guidance, and to facilitate CCC mitigation banking approval. Design alternatives may be required to address potential ACOE and CCC wetland jurisdictional areas and to accommodate the ORERP restoration project. Therefore, staff will return to the Board in January 2019 for authorization to amend the agreement with Great Ecology to complete the modeling and design alternatives.

The estimated timeline to complete the mitigation banking entitlement process for Pond 20 is included as Attachment C. Project review under the California Environmental Quality Act is anticipated to be completed in late 2019, followed by completion of Coastal Act Review, including the PMPA and Coastal Development Permit in 2020. ACOE and RWQCB construction permit applications will be submitted once the environmental review is complete, anticipated in late 2019.

The 60% project design will be completed in coordination with the ORERP team in Summer 2019. 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 in summer 2019, with the goal of starting construction in Fall 2020.

General Counsel's Comments:

The General Counsel's Office reviewed this Agenda as to form and legality.

The ACOE recently indicated that up to approximately seven acres of Pond 20 may be considered "waters of the United States" under the 2015 Clean Water Rule (CWR). Practically, such a jurisdictional finding would limit the number of mitigation credits authorized by ACOE in the Pond 20 bank and may warrant some project redesign to minimize federal jurisdictional impacts.

The CWR purported to clarify through definition those bodies of water falling within federal jurisdiction. The CWR met considerable controversy when enacted and it is unclear how long the CWR will remain in place as currently drafted. In early 2018, EPA finalized a rule known as the Suspension Rule which delayed implementation of the CWR until 2020. The Suspension Rule was intended to provide the regulatory agencies acting under new leadership time to reconsider, and likely narrow, the definition of "waters of the United States" through additional rule making.

Recent federal district court decisions have nationally enjoined and vacated the Suspension Rule. Adding complication, other federal district courts presiding over legal challenges to the CWR have issued preliminary injunctions blocking the CWR from going into effect while those cases proceed. The interplay between the preliminary injunction of the CWR and the vacating of the Suspension Rule means that the CWR currently applies only in those states where the preliminary injunction of the CWR does not-approximately half of the states, including California.¹

Legal challenges to the CWR are still pending in various federal district courts around the country and additional rulemakings to repeal the CWR and redefine "water of the United States" are also underway. As a result, there is considerable uncertainty over the extent of federal jurisdiction generally, and particularly with respect to approximately seven acres of the Pond 20 mitigation bank project as designed.

The General Counsel's Office and district staff are monitoring the litigation over the CWR and the Suspension Rule and the rule making process and will provide additional updates and recommendations as appropriate.

Environmental Review:

This Board presentation 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 wetlands 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 item 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 item 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 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:

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Attachment(s):

Attachment A	Map of Pond 20 parcels
Attachment B	Draft concept design for mitigation projects on Pond 20

Attachment C Pond 20 timeline

¹ The following is a link to a map showing where the CWR currently applies:
<https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update>.