



Legislation Text

File #: 2018-0532, **Version:** 1

DATE: January 16, 2019

SUBJECT:

WETLAND MITIGATION BANK AT POND 20, SOUTH SAN DIEGO BAY

- A) PRESENTATION AND UPDATE ON THE ENTITLEMENT PROCESS**
- B) RESOLUTION AUTHORIZING AMENDMENT #3 TO THE AGREEMENT WITH GREAT ECOLOGY TO SUPPORT THE DEVELOPMENT OF A MITIGATION BANK AT POND 20 IN THE AMOUNT OF \$164,500 TO ASSESS HYDRODYNAMICS IN COORDINATION WITH AN ADJACENT RESTORATION PROJECT ON REFUGE LAND, PROVIDE SEA LEVEL RISE AND HYDRUALIC MODELING, AND PREPARE A DESIGN ALTERNATIVE FOR A NEW TOTAL NOT TO EXCEED \$857,220. FUNDING FOR FISCAL YEAR 2019 IS BUDGETED**

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 Planning District and was included in 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. In November 2015, the Board adopted the Pond 20 Economic Development Fund, BPC Policy No. 774.

In November 2016, the Board authorized an agreement with Great Ecology to prepare design drawings, conduct a wetlands delineation in support of an Army Corps of Engineers (ACOE) jurisdictional determination, and prepare mitigation banking documentation, including the Prospectus and Bank Enabling Instrument. Additionally, the Board approved commencing environmental review.

To date, the wetlands delineation, preliminary design, and Prospectus are complete and have been submitted to the ACOE, and environmental review has been initiated. Next steps include completing the 60% design documents and environmental review technical studies, and submittal of the draft Bank Enabling instrument to the ACOE.

Additional design work and support is needed to move the project forward. The third amendment to the agreement with Great Ecology is needed, in the amount of \$164,500, to 1) assess Pond 20 mitigation bank hydrodynamics in coordination with an adjacent restoration project on the San Diego Bay National Wildlife Refuge (Refuge); 2) complete sea-level-rise and hydrology modeling and assessments required for permitting, construction, and environmental review; and 3) prepare a design alternative concept to avoid impacts to potential jurisdictional areas.

RECOMMENDATION:

Receive a presentation and update on the entitlement of a wetland mitigation bank at Pond 20, south San Diego Bay, and adopt a resolution authorizing Amendment #3 to the Agreement with Great Ecology to support the development of a mitigation bank at Pond 20 in the amount of \$164,500 to assess hydrodynamics in coordination with an adjacent restoration project on Refuge land, provide sea level rise and hydraulic modeling, and prepare a design alternative for a new total not to exceed \$857,220. Funding for fiscal year 2019 is budgeted.

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 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.

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 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 #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 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 #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 #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 (PMPA) 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 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 Bank Enabling Instrument for ACOE and IRT review. 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 Bank Enabling Instrument is a regulatory document that codifies how mitigation credits are defined, sold, and secured. The complete Prospectus, submitted to the ACOE 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 July and August 2018, the ACOE received comments from the IRT and public on the Pond 20 Prospectus. Comments will be addressed in the next entitlement document, the Bank Enabling Instrument, which will be submitted to the ACOE and IRT by Summer 2019.

In June 2018, soil sampling was completed to determine export and disposal options for the material that will be excavated from Pond 20. Sampling and testing were conducted in accordance with a sampling and analysis plan approved by the ACOE and EPA. Preliminary soil test results indicate that contaminant concentrations should not limit the District's ability to export soil as necessary.

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 (see Attachment B). The 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 regularly 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 Bank Enabling Instrument. 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 have selected a planning consultant to prepare the Environmental Impact Report and Port Master Plan Amendment, and environmental review has been initiated. A Notice of Preparation for the Environmental Impact Report (EIR) is anticipated to be issued in Spring 2019.

Agreement with Great Ecology

The agreement with Great Ecology for mitigation bank consulting services (Attachment C), in the amount of \$640,220, includes the following tasks, most of which are substantially completed: develop 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. The Bank Enabling Instrument is a regulatory document that codifies how mitigation credits are defined, sold, and secured.

Amendment #1 to the agreement with Great Ecology (Attachment D), 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.

In reviewing the ORERP 30% grading plan for coordination and planning purposes, Staff determined that additional mitigation bank design work is required to accommodate the ORERP design, including the temporary berm that will be constructed immediately north of the mitigation bank. Amendment #2 to the agreement with Great Ecology (Attachment E), 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 #3 to Agreement with Great Ecology

Amendment #3 to the agreement with Great Ecology (Attachment F), in the amount of \$164,500, will include development of a hydraulic model to assess the potential hydrodynamic and scour effects of the Pond 20 mitigation bank project with the ORERP, 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.

The preliminary design for the Pond 20 mitigation bank was authorized in 2016 based on existing conditions at the site and does not take into account the future ORERP project. The ORERP Environmental Impact Statement (EIS) was finalized in May 2018, and the ORERP 30% grading plan was provided to the District for review. Based on review of the ORERP design and an evaluation of the Pond 20 EIR requirements, it was determined that additional hydraulic modeling is needed to assess Pond 20 mitigation bank hydrodynamics in coordination with the planned ORERP project to inform the mitigation bank design and to complete necessary environmental review technical studies. Additionally, environmental review requires sea-level-rise modeling and analysis in accordance with recent state guidance. Therefore, Amendment #3 includes the hydraulic and sea-level rise modeling and analyses needed to advance the mitigation bank design and complete the necessary technical studies.

Amendment #3 will also include a Pond 20 conceptual design alternative that would avoid impacts to potential ACOE jurisdictional areas. 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. Please note, however, that it is unclear how long the CWR will remain in place as currently drafted. Legal actions challenging the CWR are proceeding in various district courts, and EPA has initiated additional rulemaking intended to narrow the reach of the CWR and definition of “waters of the United States.” 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. Nevertheless, because the application of the CWR as currently drafted could reduce the number of credits that would otherwise be available, some project redesign to minimize federal jurisdictional impacts may be warranted.

Tasks completed under Amendment #3 will 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

The estimated timeline to complete the mitigation banking entitlement process for Pond 20 is included as Attachment G.

Additional engineering and design work will be required to ensure compatibility with the ORERP. Amendment #3 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 CCC mitigation banking approval. Additionally, a Pond 20 mitigation bank design alternative concept will be advanced in the event that a project redesign is warranted to address potential ACOE and CCC wetland jurisdictional areas.

A Notice of Preparation for the EIR is anticipated to be issued in Spring 2019, with EIR certification estimated to occur in early 2020. Coastal Act Review, including the Port Master Plan Amendment and Coastal Development Permit, will also be completed in 2020.

The 60% project design will be completed in coordination with the ORERP team in Spring 2019. The 60% Basis of Design will inform the draft Bank Enabling Instrument, which will be submitted to the ACOE and IRT in Spring 2019. Prior to advancing the project beyond the 60% design level, Staff will return to the Board in Summer 2019 for authorization to complete the 100% design and preparation of technical specifications, with the goal of starting construction in Fall 2020.

General Counsel's Comments:

The General Counsel's Office reviewed this Agenda and approved the proposed amendment to the agreement with Great Ecology as presented to it 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:

Not applicable.

PREPARED BY:

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Attachment(s):

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| Attachment A: | Pond 20 parcel map |
| Attachment B: | Draft concept design for mitigation projects on Pond 20 |
| Attachment C: | Great Ecology Agreement |
| Attachment D: | Amendment #1 to Great Ecology Agreement |
| Attachment E: | Amendment #2 to Great Ecology Agreement |
| Attachment F: | Amendment #3 to Great Ecology Agreement |
| Attachment G: | Pond 20 timeline |