

COASTAL CONSERVANCY

Staff Recommendation
March 27, 2014

**JOINT POWERS AGREEMENT WITH SAN FRANCISCO BAY RESTORATION
AUTHORITY AND ASSOCIATION OF BAY AREA GOVERNMENTS**

Project Manager: Amy Hutzal

RECOMMENDED ACTION: Authorization to enter into joint powers agreement with the San Francisco Bay Restoration Authority and the Association of Bay Area Governments.

PROGRAM CATEGORY: San Francisco Bay Area Conservancy Program

EXHIBITS

Exhibit 1: [Joint Powers Agreement, Proposed Recitals & Terms, March 19, 2014](#)

Exhibit 2: [Proposed Organization Chart, March 19, 2014](#)

RESOLUTION AND FINDINGS:

Staff recommends that the State Coastal Conservancy adopt the following resolution pursuant to Sections 31160 - 31165 of the Public Resources Code:

“The State Coastal Conservancy hereby authorizes entry into a joint powers agreement with the San Francisco Bay Restoration Authority and the Association of Bay Area Governments consistent with the terms set forth in the Joint Powers Agreement, Proposed Recitals & Terms, March 19, 2014. The Coastal Conservancy has been fully informed in writing about its attorneys’ responsibilities in avoiding the representation of adverse interests without the consent of their clients, understands the potential for adverse legal interests and practical interests as described, and consents to the potential conflicts of interest raised by Conservancy staff attorneys providing legal advice to the Authority pursuant to the joint powers agreement. The Coastal Conservancy also delegates to the Executive Officer the authority to waive future attorney conflicts of interest in connection with the provision of legal services to the San Francisco Bay Restoration Authority pursuant to the joint powers agreement.”

Staff further recommends that the Conservancy adopt the following findings:

“Based on the accompanying staff report and attached exhibits, the State Coastal Conservancy hereby finds that:

1. The proposed authorization is consistent with Chapter 4.5 of Division 21 of the Public Resources Code, regarding San Francisco Bay Area Conservancy Program.”
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PROJECT SUMMARY:

At its January 23, 2014 meeting, the Conservancy discussed entering into a joint powers agreement (“JPA”) with the San Francisco Bay Restoration Authority (“Authority”) and the Association of Bay Area Governments (“ABAG”) that would provide for Conservancy and ABAG staff to perform staff functions for the Authority. Since then, the proposed JPA terms have been revised slightly and recitals have been drafted. The revisions and recitals are intended to clarify that Conservancy staff will bring their expertise and perspectives as state employees to performance of their services for the Authority, and that Conservancy staff will not provide services beyond those necessary to implement the San Francisco Bay Restoration Authority Act, consistent with the Conservancy’s enabling legislation. In addition, the formatting of the organization chart has been revised to more prominently display the estimated personnel years for ABAG and the Conservancy. The current proposed JPA terms and recitals are attached as Exhibit 1 to this staff report and the proposed organization chart is attached as Exhibit 2 to this staff report. As discussed below, there remains an unresolved issue of how the JPA should address tort liability of the parties.

ABAG has authorized its staff to enter into the JPA. The Authority authorized entry into the JPA at its meeting on March 19, 2014. With authorization from the Conservancy, the JPA could be executed and become effective in April.

Discussion

The San Francisco Bay Restoration Authority

The San Francisco Bay Restoration Authority Act (“Restoration Authority Act”) established the Authority in 2008 as a regional entity “to raise and allocate resources for the restoration, enhancement, protection, and enjoyment of wetlands and wildlife habitats in the San Francisco Bay and along its shoreline.” Government Code § 66702(a) & (c). The intent of the Restoration Authority Act is to “complement existing efforts by cities, counties, districts, the San Francisco Bay Conservation and Development Commission, the State Coastal Conservancy, and other local, regional, and state entities.” Government Code § 66702.5.

The Restoration Authority Act gives the Authority the power to levy a benefit assessment or special tax across the nine counties in the San Francisco Bay region and to award grants for projects that:

- (1) Restore, protect, or enhance tidal wetlands, managed ponds, or natural habitats on the shoreline in the San Francisco Bay area, excluding the Delta primary zone.
- (2) Build or enhance shoreline levees or other flood management features that are part of a project to restore, enhance, or protect tidal wetlands, managed ponds, or natural habitats identified in paragraph (1).

(3) Provide or improve public access or recreational amenities that are part of a project to restore, enhance, or protect tidal wetlands, managed ponds, or natural habitats identified in paragraph (1).

Government Code § 66704.5. In addition to creating hundreds of jobs and restoring fish and wildlife habitat, projects funded by the Authority will help keep toxic pollutants out of the Bay, improve water quality in the Bay, help protect existing shoreline property from flooding, and expand public access to the shoreline. The Authority's grant program is limited to the types of projects identified above and it does not have the power to own property.

The decision to place a special tax measure on the ballot rests with Authority's seven-member Governing Board, which is appointed by ABAG.¹ A special tax requires approval of two-thirds of the voters to pass. Should a ballot measure be successful, the Authority will award grants to support Bay projects with input from an Advisory Committee that is appointed by the Authority and made up of private citizens, local stakeholders and experts on Bay issues.

The Authority receives no funding from the State and does not have access to any other fiscal resources. Since 2008, several ABAG staff members have served as temporary staff to the Authority and the Conservancy has provided assistance. Grants to the Authority from nonprofit foundations have funded two polls, the most recent of which indicates public support in the region for a parcel tax to fund wetland restoration projects within the Authority's purview. The Authority is considering placing on the November, 2014 ballot a special tax of approximately \$10 per parcel which is estimated to generate approximately \$15 million per year. The current intention is to include all 9 counties in the measure with a 10-15 year sunset provision. The Authority will formally decide whether to place such a tax on the November 2014 ballot at its meeting on May 28, 2014.

The Proposed JPA

The proposed JPA provides for Conservancy staff to provide executive, legal, program, project, and clerical staff services to the Authority, and for ABAG to provide treasurer, accounting, program, and project staff services to the Authority. If a revenue measure passes, the Authority would reimburse ABAG and the Conservancy for their staff services based on budgets prepared by ABAG and the Conservancy and approved by the Authority. The Conservancy and ABAG could withdraw from the JPA or the Authority could terminate the JPA, upon 180 days notice to the other parties.

¹ The current members of the Governing Board and the seats they occupy are:

- East Bay City/County – Supervisor John Gioia,
- North Bay City/County – Supervisor Keith Caldwell,
- South Bay City/County – Councilmember Rosanne Foust,
- West Bay City/County – Supervisor Dave Pine,
- At Large City/County – Supervisor Cindy Chavez,
- Park/Open Space District – John Sutter (East Bay Regional Park District) and
- Chairperson – Vacant.

Authority to Enter the JPA

The proposed JPA is consistent with the Joint Exercise of Powers Act. The Joint Exercise of Powers Act authorizes public entities to enter into agreements with each other to jointly exercise any power common to the parties. Government Code § 6502. One or more of the parties to a joint powers agreement may provide services to the other parties as specified in the agreement. Government Code § 6506. The Authority, ABAG and the Conservancy have in common the power to grant funds for projects that restore, protect and enhance San Francisco Bay. The proposed JPA provides for the joint exercise of this common power by having Conservancy and ABAG provide staff services to the Authority. Thus, the proposed JPA is consistent with the law and accordingly, the Conservancy has the authority to enter into the proposed JPA.

Benefits of the JPA

There are numerous benefits of the proposed JPA. The JPA will help the Conservancy achieve its goals for the San Francisco Bay as set forth in Chapter 4.5 of Division 21 of the Public Resources Code. If the Authority is successful in raising revenue, it will provide a local source of funding for Bay restoration to augment state and federal funding, which has been diminishing. The JPA will give the Conservancy a role in the allocation of those local funds thereby helping to further the Conservancy's statutory goals and bringing a statewide perspective to allocation of those funds. Further, the Conservancy will be reimbursed for its staff services. The Conservancy's San Francisco Bay Area Conservancy Program has played a significant role in the collaborative efforts of federal, state and local government agencies to prepare and implement plans that reflect the mutual goals of these agencies for protection, enhancement and restoration of San Francisco Bay and associated public access and flood management. The resulting plans include:

- San Francisco Baylands Ecosystem Habitat Goals and its Climate Change Update,
- San Francisco Bay Subtidal Habitat Goals,
- San Francisco Estuary Partnership's Comprehensive Conservation and Management Plan,
- San Francisco Bay Region's Integrated Regional Water Management Plan,
- South Bay Salt Pond Restoration Plan and South Bay Shoreline Study, and
- San Francisco Bay Trail Plan.

Obtaining reimbursement for its staff services to the Authority will provide a source of funding that will help the Conservancy to continue its important role in protection and restoration of San Francisco Bay.

The Authority's ballot measure will likely cap project management costs associated with the parcel tax at 5% to assure voters that the tax revenues will be used efficiently. ABAG and the Conservancy have developed a staffing proposal that will keep administrative costs below this cap while effectively implementing a transparent and results-oriented grant program as well as providing the necessary fiscal and budgetary management.

JPA Term Regarding Indemnification

The Authority has agreed to indemnify ABAG and the Conservancy with regard to tort liability arising out of performance of the agreement. Although the Authority initially expressed a preference for ABAG and the Conservancy to indemnify the Authority, the Authority determined that the annual cost of general liability and automobile insurance is reasonable. The cost estimate is an annual premium of \$12,500 for general liability, automobile liability and public officials errors and omissions insurance coverage with limits of \$5,000,000 and a \$1,000 deductible. In light of the cost of insurance, the Authority agreed to indemnify the Conservancy and ABAG in the joint powers agreement. Conservancy staff recommends that the Conservancy agree to indemnify the Authority for tort liability in connection with the Conservancy's performance under the agreement prior to the time that the Authority has sufficient funds to purchase the insurance.

Waiver of Attorney Conflict of Interest

The proposed JPA provides for the Conservancy's staff attorneys to provide legal advice to the Authority. Several statutes and the Rules of Professional Conduct of the State Bar of California, including Rule 3-310(C), govern attorneys in the representation of potentially and actually adverse interests, and collectively require informed consent of both clients. Lawyers must also strictly maintain the confidences of their clients. Bus. & Professions Code § 6068(e)(1). The interests of the Conservancy and the Authority in a matter could conflict, at least in theory. For example, the two agencies might both seek the same limited funds, or might have differing positions on pending legislation or litigation. Under Rule 3-310(C), an attorney may not, without the written consent of both clients: 1) accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or 2) accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or 3) represent an entity in a matter and at the same time accept as a client in a separate matter an entity that has an adverse interest in the first matter. In the event of an actual conflict between the two agencies, the Authority would need to seek legal advice from the Attorney General's Office, unless the agencies both waived the actual conflict of interest. The Conservancy's attorneys are not aware of any actual adverse interests between the Conservancy and the Authority, and think that the chances of an actual legal conflict of interest are likely to be small. By making full disclosure of potential conflicts to the Authority and the Conservancy, and by obtaining the formal, informed written consent of both, Conservancy attorneys can provide services to the Authority while complying with the Rules that require avoidance of representing adverse interests. Accordingly, the resolution for approval of the JPA includes written consent of the Conservancy for Conservancy attorneys to also advise the Authority.

COMPLIANCE WITH CEQA:

The proposed authorization does not have the potential to result in a physical change in the environment, and so under 14 Cal. Code of Regs. § 11378, is not a project subject to the California Environmental Quality Act.