

COASTAL CONSERVANCY

Staff Recommendation
September 29, 2016

**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 a 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, July 29, 2016](#)

Exhibit 2: [Measure AA: San Francisco Bay Clean Water, Pollution Prevention and Habitat Restoration Program](#)

Exhibit 3: [Project Letters](#)

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 Exhibit 1: Joint Powers Agreement, Proposed Recitals & Terms. 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.”
-

PROJECT SUMMARY:

On June 6, 2016, the voters in the nine-county San Francisco Bay Area (Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma Counties) passed Measure AA, the San Francisco Bay Clean Water, Pollution Prevention and Habitat Restoration Program, by over 70%. Measure AA was placed on the ballot by the San Francisco Bay Restoration Authority (“Authority”) and will generate approximately \$25 million per year for 20 years to protect San Francisco Bay for future generations by reducing trash, pollution and harmful toxins, improving water quality, restoring habitat for fish, birds and wildlife, protecting communities from floods, and increasing shoreline public access.

The Authority has a seven-member Governing Board, which is appointed by the Association of Bay Area Governments (“ABAG”).¹ Since 2008, several ABAG staff members have served as temporary staff to the Authority and the Conservancy has provided assistance. Before the passage of Measure AA, the Authority had no financial resources and the administrative work necessary to date has been relatively minor. The distribution and oversight of Measure AA funding necessitates a larger and more formal administrative structure.

Five percent of the funds generated annually by Measure AA may go for general government purposes, such as administering the Authority. Necessary administrative tasks include preparation for and staffing of Authority Board meetings, staff support for the Advisory Committee and Independent Citizens Oversight Committee, development of policies and procedures for the Authority, preparation and distribution of requests for grant proposals, development of selection criteria, review of grant applications, preparation of grant agreements and oversight of grantees, and legal support for the Authority.

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

- Chairperson – Supervisor Dave Pine,
- East Bay City/County – Supervisor John Gioia,
- North Bay City/County – Supervisor Keith Caldwell,
- South Bay City/County – Councilmember Vinnie Bacon,
- West Bay City/County – Supervisor Scott Wiener,
- At Large City/County – Mayor Pat Showalter, and
- Park/Open Space District – John Sutter (East Bay Regional Park District).

A joint powers agreement (“JPA”) is being proposed that would enable the Authority, ABAG, and the Conservancy to collaborate so as to avoid administrative redundancy and to economically and efficiently implement their San Francisco Bay grant programs, and that would allow the Authority to take advantage of existing knowledge and expertise in wetlands restoration and grant management. In 2014, both ABAG and the Authority authorized entry into a JPA with the Conservancy. The Conservancy discussed entering into a JPA with the Authority and ABAG at its January and March meetings in 2014 and took no action. With the passage of Measure AA, the need for the support services that can be provided by the Conservancy and ABAG has increased, funds will soon be available to reimburse for administrative costs, and the JPA has been revisited. On July 29, 2016, the Authority approved in concept the attached JPA Proposed Recitals and Terms (Exhibit 1). On September 15, 2016, ABAG reauthorized execution of the JPA. Pending Conservancy authorization, the Authority will consider approval of the final JPA terms and conditions on October 12, 2016.

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.

Measure AA

The Authority placed Measure AA, the *San Francisco Bay Clean Water, Pollution Prevention and Habitat Restoration Program* on the June 6, 2016 ballot in the nine-county San Francisco

Bay Area, after eight years of analysis, outreach, and public opinion polling. Measure AA passed by over 70% and will generate approximately \$25 million per year for 20 years with a \$12 per parcel tax. Measure AA (complete text in Exhibit 2) calls for the Authority to fund projects along the Bay shoreline to advance the following programs:

- 1) Safe, Clean Water and Pollution Prevention Program.
- 2) Vital Fish, Bird and Wildlife Habitat Program.
- 3) Integrated Flood Protection Program.
- 4) Shoreline Public Access Program.

The nine Bay Area counties will start including Measure AA on their property tax bills in the fall of 2017, with revenue anticipated to arrive at the Authority in late 2017. Measure AA funds will be distributed through competitive grant rounds. In April 2016, the Authority adopted grant program guidelines that outline project eligibility as described in the enabling legislation and Measure AA, and set forth the grant application process and timeline.

Measure AA limits the amount of revenue that can go towards general government purposes to no more than 5%, to ensure that the tax revenues will be used efficiently. Five percent of approximately \$25 million per year is approximately \$1,250,000. General government purposes include both the administration of the Authority and the payments to each of the nine counties for placing the measure on the ballot, which are estimated at \$2 million. ABAG and Conservancy staff have developed a staffing proposal that will keep administrative costs below this cap and allow for payment of ballot access costs while effectively implementing a transparent and results-oriented grant program as well as providing the necessary fiscal and budgetary management.

The Proposed JPA

The proposed JPA provides for Conservancy staff to provide executive, legal, program, and clerical staff services to the Authority, and for ABAG to provide treasurer, accounting, and program staff services to the Authority. The Authority would reimburse ABAG and the Conservancy for their staff services based on an annual budget and work plan 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 prior notice to the other parties.

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 powers 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. Authority revenue will provide a local source of funding for Bay restoration to augment and leverage state and federal funding. 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 Joint Venture's Implementation Plan,
- San Francisco Bay Region's Integrated Regional Water Management Plan,
- South Bay Salt Pond Restoration Plan and South Bay Shoreline Study,
- San Francisco Bay Trail Plan, and
- San Francisco Bay Area Water 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 the protection and restoration of San Francisco Bay.

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. In 2014, the cost estimate for general liability and automobile insurance was an annual premium of \$12,500 for general liability, automobile liability and public official errors and omissions insurance coverage with limits of \$5,000,000 and a \$1,000 deductible. In light of the relatively low 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 another source, 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 for the Conservancy to enter into a joint powers agreement for the implementation of the Restoration Authority Act is an administrative activity of government that will not result in direct or indirect physical changes in the environment. Such activities do not constitute a "project" as defined in the California Environmental Quality Act (CEQA) at Public Resources Code § 21065 and in the CEQA Guidelines at 14 Cal. Code of Regs. § 15378(b)(5). Therefore, the proposed authorization is not subject to CEQA.